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RACE AND THE DEATH PENALTY: THE TENSION BETWEEN INDIVIDUALIZED JUSTICE AND RACIALLY NEUTRAL STANDARDS

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INTRODUCTION

This article discusses the tension between individualized justice and equality in death penalty cases, and how the defendant's race influences these decisions. Racially neutral standards ensure some notion of equality and fair treatment, but at the expense of losing individualization. This pressure is similar to the tension manifested in the current firestorm surrounding affirmative action.[1]

Opponents of affirmative action argue against racial or gender preferences in favor of using neutral standards to determine how society distributes its benefits.[2] They argue the use of racially neutral standards ensures that decision makers hire the best applicant regardless of race. Affirmative action proponents argue, however, the use of racially neutral standards prohibits individualization of the benefit distribution process. They argue individualization provides a decision maker discretion to account for an applicant's membership in a historically disenfranchised group.[3] Both arguments are correct. Discretion allows for individualization of the process, but also permits discrimination. In the capital punishment context, the United States Supreme Court has continually struggled with the tension between individualized justice and equality.

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1. *See, e.g.,* Paul Barton, *Affirmative Action Under Fire After Controversial History,* GANNETT NEWS SERV., Mar. 10, 1995; Paul Barton, Letters Desk, *Affirmative Action Debate,* L.A. TIMES, Mar. 13, 1995, at B1; George Rodrigue, *Affirmative Action Proving Hot Issue,* THE DALLAS MORNING NEWS, Mar. 12, 1995, at A1.

2. *See, e.g.,* Raymond R. Coffey, *A New Accent on the Negatives in Affirmative Action,* CHICAGO SUN-TIMES, Mar. 12, 1995, at 6; Paul Burton, *Affirmative Action Under Attack From Many Directions,* GANNET NEWS SERV., Mar. 10, 1995; Les Payne, *Affirmative Action Does Raise Doubts,* NEWSDAY, Mar. 12, 1995, at A38. *See also* City of Richmond v. Croson, 488 U.S. 469 (1989) (O'Connor, J.).

3. *See, e.g.,* Cindy D. Brown, *Urban League Leader Defends Affirmative Action,* NEWS TRIB., Mar. 10, 1995, at B3; Op-Ed, *Still a Need for Affirmative Action,* WASH. POST, Mar. 10, 1995, at A14; Judy Tachibana, *A Voice For Affirmative Action,* SACRAMENTO BEE, Mar. 13, 1995, at B1. *See also Croson,* 488 U.S. at 539-55 (Marshall, J., dissenting).

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In *Furman v. Georgia*,[4] the Court effectively abolished the death penalty because it found juries exercised unfettered discretion.[5] While discretion allows for individualization of the process by which juries impose the death sentence, it also allows juries to discriminate. Some states proposed mandatory death sentences as the appropriate cure.[6] The Court rejected this approach as too limiting.[7] While eliminating discretion appears to remove the potential to discriminate, it also prohibits individualization of the process. Unsatisfied with unfettered jury discretion at one extreme, and no discretion at the other, in *Gregg v. Georgia*[8] the Court chose a middle ground.[9] In *Gregg*, the Court declared constitutional those state death penalty schemes that provided for guided discretion.[10] The Court found guided discretion statutes attractive because they provided for individualization of the process. Inasmuch as those statutes guided discretion, they also provided at least the appearance of equality.[11]

Post-*Gregg* cases share its rationale. If a statute claimed to guide discretion, the Court presumed it did and usually pronounced the statute constitutional. The post-*Gregg* Court entered a phase that eventually challenged the very standards the *Furman* Court claimed had solved prior infirmities in capital punishment sentencing. This phase of development in the Court's death penalty jurisprudence culminated in *McCleskey v. Kemp*.[12]

In *McCleskey*, the petitioner presented the most comprehensive study on race and the death penalty ever conducted.[13] The petitioner demonstrated that black defendants with white victims were 4.3 times more likely to be sentenced to death than defendants charged with killing blacks.[14] The Court rejected the petitioner's claim, noting with seeming ambivalence that discrimination existed in all processes.[15] Thus, notwithstanding statistical evidence that on its face implied racial discrimination, the Court allowed Georgia to execute Warren McCleskey.[16] Consequently, it follows that as long as society demands or accepts the death penalty, it must also accept the fact that juries may impose the death sentence on a discriminatory basis.

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4. 408 U.S. 238 (1972) (per curiam).
5. *Id.* at 240 (Douglas, J., concurring); *id.* at 314 (White, J., concurring).
6. *See* Woodson v. North Carolina, 428 U.S. 280 (1976) (Stewart, J.) and Roberts v. Louisiana, 428 U.S. 325 (1976) (Stevens, J.).
7. *Woodson,* 428 U.S. at 299-305; *Roberts,* 428 U.S. at 332-33.
8. 428 U.S. 153 (1976).
9. *Id.* at 206.
10. *Id.* (Stewart, J.).
11. *Id.*
12. 481 U.S. 279 (1987).
13. *Id.* at 286-87; *see infra* note 225 and accompanying text.
14. *McCleskey,* 481 U.S. at 287.
15. *Id.* at 312-13.
16. *See, e.g.,* Lyle V. Harris & Mark Gurriden, *McCleskey is Executed for '78 Killing*, ATLANTA J. & CONST., Sept. 25, 1991, at A1.

Part I of this article analyzes the various opinions in *Furman v. Georgia*. Part II investigates the various types of discretion and their meaning. Part III discusses *Gregg v. Georgia* and the standards set forth in its companion cases. Part IV examines the evisceration of these standards. Part V scrutinizes the *McCleskey v. Kemp* decision.

I. *FURMAN V. GEORGIA*

In the 1972 case, *Furman v. Georgia,*[17] the Court held the death penalty, as then applied, violated the Eighth Amendment's prohibition against cruel and unusual punishments.[18] However, the Court did not reach a majority opinion. Instead, each Justice wrote a separate opinion, together totaling 232 pages, thus confusing the precise scope and parameters of its decision.

The issues presented in *Furman* required the Court to define the components of the Eighth Amendment's Cruel and Unusual Punishments Clause[19] and to decide whether that amendment offered sufficient grounds for holding the death penalty *per se* unconstitutional. *Furman* represented the first case where the United States Supreme Court considered this question.

Previously, the Court presumed the death penalty existed as a constitutional form of punishment. Thus, all pre-*Furman* challenges to capital punishment focused on the particular method of imposing it.[20] In *Furman,* only Justices Brennan and Marshall found the death penalty *per se* cruel and unusual. Justices Douglas, Stewart, and White based their decisions on a narrower ground, and found the death pen-

17. 408 U.S. 238 (1972) (per curiam).

18. The NAACP Legal Defense and Educational Fund, Inc. [hereinafter "LDF"] created a strategy of attacking capital punishment with an entire range of arguments against it. *See* Eric L. Muller, *The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death,* 4 YALE L. & POL'Y REV. 158 (1985). LDF had as its goal the creation of a death row logjam. The strategy succeeded, culminating with the ruling in *Furman.* LDF focused on the procedures by which states imposed the death penalty, rather than concentrating on the *per se* constitutionality of capital punishment. In the companion cases of McGautha v. California and Crampton v. Ohio, 402 U.S. 183 (1971), decided a year before *Furman,* the defendants argued that standardless jury sentences in capital cases are so open to caprice and discrimination, in the selection of those who were executed and those whose lives were spared, as to violate due process guarantees. *Id.* at 299. In addition, *Crampton* challenged the constitutionality of single-verdict (unitary) trials. The Court rejected both arguments, holding that states could place life and death choices in the hands of juries with *absolute discretion. Id.* at 207. Also, the Court held the jury need not determine punishment at a separate proceeding following the trial on the issue of guilt. *Id.* at 221. *Furman,* in effect, overturned these two decisions.

19. U.S. CONST. amend VIII.

20. *See, e.g.,* Wilkerson v. Utah, 99 U.S. 130 (1878) (Court ruled a public shooting was constitutionally acceptable form of capital punishment); *In re* Kemmler, 136 U.S. 436 (1890) (Court held electrocution was constitutionally acceptable form of capital punishment); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (Court allowed petitioner to be electrocuted a second time after first attempt failed).

alty operated unconstitutionally because of the way it was imposed by the states.[21]

Justice Brennan argued the Eighth Amendment requires that a penalty comport with human dignity.[22] Brennan's concept of human dignity under the Eighth Amendment required acceptability to contemporary society, a proscription against arbitrariness, and a ban on excessiveness. Justice Brennan stated, "The function of these principles . . . is simply to provide means by which a court can determine whether a challenged punishment comports with human dignity."[23]

Chief Justice Warren first established human dignity as a component of the Eighth Amendment in *Trop v. Dulles,*[24] where he argued that underlying the Eighth Amendment was nothing less than a commitment to the dignity of man.[25] For Justice Brennan, *Furman* posed the following question: How does a state know if a punishment violates human dignity? Justice Brennan provided two answers.

First, a punishment violates human dignity when it is torturous, barbarous, or inhuman.[26] Second, "in most cases it will be [the] convergence [of the principles of non-arbitrariness, acceptability by society, and non-excessiveness] that will justify the conclusion that a punishment is 'cruel and unusual.' "[27] In other words, for Brennan, if a punishment was torturous, barbarous, or inhuman; or if it was applied arbitrarily, rejected by society, and served no greater purpose than to punish, it violated human dignity and thereby violated the Cruel and Unusual Punishments Clause.

Within Justice Brennan's broad definition of human dignity was an explicit concern for arbitrariness. For Brennan, arbitrariness was

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21. *Furman*, 408 U.S. at 253-57 (Douglas, J., concurring); *id.* at 308-10 (Stewart, J., concurring); *id.* at 310-14 (White, J., concurring).

22. *Id.* at 272-73 (Brennan, J., concurring).

23. *Id.* at 282 (Brennan, J., concurring). In *Wilkerson,* the Court held a punishment could not involve "unnecessary cruelty." *Wilkerson*, 99 U.S. at 136. Shortly thereafter, in *In re Kemmler*, 136 U.S. 436 (1890), the Court held a punishment could not be inhuman or barbarous. *Id.* at 447. These decisions illustrated the Court's slow progression to the standard that a punishment must comport with human dignity, as articulated by Justice Brennan in *Furman.*

Justice Brennan's concept of human dignity is also articulated by Kant's principle of respect for persons: "Act with reference to every rational being (whether yourself or another) so that it is an end in itself . . . and . . . never . . . a mere means." CAPITAL PUNISHMENT IN THE UNITED STATES 282 (Hugo Bedau ed., 1975).

> Even the most loathsome criminal, justly convicted of a heinous offense by due process of law, has a moral claim upon the society which has condemned him: his humanity must be respected even while he is being punished. The state must not deny what is undeniable: that this man, though condemned, is still unalienably a man.

Id. at 294.

24. 356 U.S. 86 (1958).

25. *Id.* at 100.

26. *Furman*, 408 U.S. at 271 (Brennan, J., concurring) (citing Weems v. United States, 217 U.S. 349, 366 (1910)).

27. *Id.* at 282.

linked to human dignity. "[T]he state does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments."[28]

Justice Brennan contended the death penalty was, at that time, imposed arbitrarily, and was thus incompatible with the Eighth Amendment's concern for human dignity. He identified two kinds of arbitrariness: infrequency of application, and lack of any rational basis to distinguish those who receive the death penalty from those who do not.

> When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. No one has yet suggested a rational basis that could differentiate . . . the few who die from the many who go to prison.[29]

This distinction is important because if infrequency is the only problem, a state can satisfy the Eighth Amendment by instituting a mandatory death penalty to increase the number of those executed.[30] Arbitrariness also results where there is no rational basis to distinguish those who receive death from those who do not. Since mandatory death sentences are constitutionally impermissible, the solution for this second kind of arbitrariness becomes much more complex because some type of standard is necessary in order to achieve a rational basis.[31]

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28. *Id.* at 274.

29. *Id.* at 293-94. In support of Justice Brennan, Steven Nathanson says, "[J]udgments about who deserves a particular punishment are arbitrary because the law does not contain meaningful standards for distinguishing those who deserve death from those who deserve imprisonment." STEVEN NATHANSON, AN EYE FOR AN EYE? THE MORALITY OF PUNISHING BY DEATH 52 (1987).

30. Justice White indicated that when the imposition of the death penalty reaches a certain degree of infrequency, "its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social purpose. A penalty with such negligible returns to the state would be violative of the Eighth Amendment." *Furman*, 408 U.S. at 311-12 (White, J., concurring).

Significantly, Justice White did indeed vote to uphold mandatory death sentences in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976). However, in both cases, the plurality ruled mandatory death sentences unconstitutional. *Woodson*, 428 U.S. at 305; *Roberts*, 428 U.S. at 336. The Court based its decisions in part on the fact that mandatory death sentences prevent the introduction of mitigating factors which help to individualize justice. In *Woodson*, the Court held individualized justice was a fundamental requirement of the Eighth Amendment. *Woodson*, 428 U.S. at 304. Therefore, mandatory death sentences were held to be violative of the Eighth Amendment because they prevented the individualization of justice. *Id.*

31. Justice Stewart concluded that at the time of *Furman* this latter form of arbitrariness was the real infirmity in the imposition of the death penalty. He stated "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of

Furman never clearly resolved the tension between infrequency and rationality. Justice Brennan stated, "[T]he objective indicator of society's view of an unusually severe punishment is what society does with it, and today society will inflict death upon only a small sample of the eligible criminals."[32] In other words, according to Justice Brennan, both forms of arbitrariness were present. The death penalty was so infrequently imposed, it seemed society had rejected it. Yet, in the few instances where the death penalty was imposed, there is no rational way to distinguish those who received the death penalty from those who did not.

Justice Brennan's reliance on society's view of capital punishment was grounded in the idea that one of the Eighth Amendment's underlying principles is that a punishment must comport with "evolving standards of decency that mark the progress of a maturing society."[33] Justice Marshall, who took a similar approach, also examined the acceptability of the death penalty to society.[34] Marshall looked to public acceptability, but qualified his position by focusing on what he called an informed citizenry.[35] An informed citizenry would know how the death penalty operates. Marshall argued that if people knew states imposed the death penalty in a way that discriminated against identifiable classes of people, they would find it "immoral and therefore unconstitutional."[36] Further, Justice Marshall found untrammeled jury discretion to be the primary source of discrimination.[37] Critiquing the *McGautha v. California*[38] ruling, Marshall said, "[t]his was an open invitation to discrimination."[39] "Regarding discrimination, . . . '[i]t is usually the poor, the illiterate, the underprivileged, the member of the minority group—the man who, because he is without means, and is

death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

32. *Id.* at 300 (Brennan, J., concurring).

33. *Id.* at 269. The Court first enunciated this principle in Weems v.United States, 217 U.S. 349 (1910), and later in Trop v. Dulles, 356 U.S. 86 (1958).

34. *Furman*, 408 U.S. at 329-71 (Marshall, J., concurring).

35. *Id.* at 361 n.145.

36. *Id.* at 363 (Marshall, J., concurring). Given that forty-four states and the federal government all had capital sentencing statutes at the time of *Furman*, Justice Marshall's hypothesis lacked substantive empirical evidence. *See* THE DEATH PENALTY IN AMERICA 3-38 (Hugo Bedau ed., 3d ed. 1982). In testing the Marshall hypothesis, Neil Vidmar and Austin Sarat found that, "the public is ill-informed about capital punishment, if it were informed it would tend to reject the death penalty, but to the extent that retribution provides the basis of death penalty support, information will have no effect on public opinion." Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis,* 1976 WIS. L. REV. 171, 196 (1976).

37. 408 U.S. at 365. Compare McGautha v. California, 402 U.S. 183 (1971), where the Court ruled "committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is [not] offensive to anything in the Constitution." *Id.* at 207.

38. 402 U.S. 183 (1971).

39. *Furman*, 408 U.S. at 365. (Marshall, J., concurring).

defended by a court-appointed attorney—who becomes society's sacrificial lamb.' "[40] In support of Justice Marshall, Professor Nathanson argues,

> Given this lack of standards [to guide jury discretion], factors that should have no influence will in fact be the primary bases of decision.
>
> . . . .
>
> If prosecutors, juries, and judges do not have clear criteria by which to sort out these issues or if the criteria can be neglected in practice, then judgments about who deserves to face death rather than imprisonment will be arbitrary.[41]

Justice Douglas was concerned with discrimination in the imposition of the death penalty.[42] Douglas argued that punishments which violated the Fourteenth Amendment's Equal Protection Clause are cruel and unusual in the Eighth Amendment sense.[43] Douglas read equal protection of the law into the Eighth Amendment's ban on cruel and unusual punishments.[44] This view demonstrated that Douglas regarded prohibition against discrimination as an element of the Eighth Amendment.[45] Douglas considered capital punishment to be unusual if it discriminated against a defendant. "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."[46] Echoing Justice Douglas, Ernest van den Haag states, "[t]he 'unusual' punishment may discriminate against those to whom it is applied in an entirely capricious or in a systematically biased manner."[47]

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40. *Id.* at 364 (Marshall, J., concurring) (footnote omitted) (alteration in original).

41. NATHANSON, *supra* note 29, at 52-53.

42. *Furman*, 408 U.S. at 249-57 (Douglas, J., concurring).

43. *Id.* at 256-57.

44. *Id.* at 249 (Douglas, J., concurring).

45. Treating discrimination as an element of the Eighth Amendment became important in McCleskey v. Kemp, 481 U.S. 279 (1987), where the United States Supreme Court rejected petitioner's claim, based on a sophisticated statistical analysis of the Georgia capital punishment system, that murderers of whites and black murderers were more likely to receive the death penalty than any other racial combination and, therefore, the death penalty should be abolished. *Id.* at 291-92. The Court reasoned that the evidence presented by petitioner failed to establish a Fourteenth Amendment claim of discrimination. *Id.* However, Justice Brennan argued that if a *risk* of discrimination could be shown, then that was enough to satisfy a discrimination claim under the Eighth Amendment. Brennan's argument, of course, presumed that a prohibition on discrimination was an element of the Eighth Amendment. *Id.* at 320-25 (Brennan, J., dissenting). For a discussion and analysis of McCleskey's Fourteenth Amendment claim, see Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

46. *Furman,* 408 U.S. at 242 (Douglas, J. concurring).

47. ERNEST VAN DEN HAAG & JOHN P. CONRAD, THE DEATH PENALTY: A DEBATE 205 (1983).

Like Marshall, Justice Douglas contended selective application of the death penalty to minorities was the product of a system of standardless jury discretion.

> [W]e deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.[48]

The resulting discrimination led Douglas to conclude "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."[49]

Like Douglas, Justice White found fault in jury discretion. Further, White contended jury discretion causes inconsistent and infrequent imposition of the death penalty.[50]

> [P]ast and present legislative judgment . . . 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* . . . may refuse to impose the death penalty no matter what the circumstances of the crime.[51]

Justice Stewart also viewed jury discretion as an infirmity in the imposition of the death penalty. He wrote, "[T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [I]f any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race."[52]

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48. *Furman*, 408 U.S. at 253 (Douglas, J., concurring). He cited a study of the Texas capital sentencing system from 1924-1968, which found that 88.4% of the black defendants received the death penalty as opposed to 79.8% of the white defendants and only 11.6% of the black defendants had their sentences commuted compared with 20.2% of the white defendants. *Id.* at 250.

49. Id. at 256-57 (Douglas, J., concurring) (emphasis added). Justice Douglas' argument stood in stark contrast to Justice Powell's reasoning in both *Furman* and *McCleskey*, where Powell worked diligently to save capital punishment. In *Furman*, Powell wrote, "[t]he possibility of racial bias in the trial and sentencing process has diminished in recent years." *Id.* at 450 (Powell, J., dissenting). It is important to note that the emphasis was on the reduction of racial bias, which means it was still present. The issue then centered on how much racial bias is too much. Justice Powell responded to this in *McCleskey*, reasoning that, "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system. . . . [The] Court has recognized, any mode for determining guilt or punishment 'has its weaknesses and the potential for misuse.' " *McCleskey*, 481 U.S. at 312-13.

50. *Furman*, 408 U.S. at 311-13 (White, J., concurring).

51. *Id.* at 314 (White, J., concurring) (emphasis added).

52. *Id.* at 309-10 (Stewart, J., concurring). According to Ernest van den Haag,

> [T]he infrequency or the unusualness of a punishment becomes constitutionally relevant precisely because it implies discrimination against those who suffer the unusual punishment. It singles out some persons, or groups of per-

Justices Douglas, Brennan, Stewart, White, and Marshall all dealt with the discretion problem, especially jury discretion. Unguided jury discretion warrants such concern because, inherently, it engenders or at least fosters arbitrariness, whether by infrequency of application of the death penalty, or the lack of a rational basis by which to distinguish those who receive death from those who receive imprisonment. Consequently, in order to prevent arbitrariness or discrimination, courts or states must establish guidelines that channel or eliminate jury discretion.[53] All five Justices criticized unguided jury discretion as the cause of arbitrariness and discrimination. Thus, herein lie the key issues in post-*Furman* death penalty cases—discretion and discrimination. In order to understand the link between the two, it is important to look more closely at the meaning of discretion.

II. DISCRETION

In *Furman,* Justices Brennan, Marshall, Douglas, Stewart, and White focused on the notion that sentencing discretion resulted in arbitrary, capricious, or infrequent imposition of the death penalty.[54] Nonetheless, Justices Douglas, Stewart, and White did not seek to entirely eliminate discretion. Discretion is necessary in order to individualize justice. This is the paradoxical question a discussion of discretion poses—discretion is necessary to achieve individualization, and with individualization comes the potential for abuse. What exactly is discretion and how was it used in *Furman*? To answer this

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> sons, who, having committed a crime, are more severely punished by the 'unusual' punishment than are others who have committed the same crime. Surely, at least in the past, this happened to blacks who committed crimes against whites.

VAN DEN HAAG & CONRAD, *supra* note 47, at 205.

53. Chief Justice Burger, however, in his *Furman* dissent, vociferously opposed guidelines for jury discretion. He argued that the Eighth Amendment did not require such guidelines, and even if it did, the establishment of such guidelines would make no difference: "The Eighth Amendment was included in the Bill of Rights to assure that certain types of punishments would never be imposed, not to channelize the sentencing process." *Furman,* 408 U.S. at 399. He continued, "[T]here is little reason to believe that sentencing standards in any form will substantially alter the discretionary character of the prevailing system of sentencing in capital cases." *Id.* at 401.

An examination of the statistics introduced by McCleskey indicated the correctness of Chief Justice Burger's position. *See infra* note 219. However, the Court never really enforced the standards designed to guide jury discretion as constitutionalized in *Gregg, see infra* Part IV. Thus, this lack of enforcement made it difficult to determine whether or not these standards would have worked to eradicate discrimination in death penalty sentencing.

Chief Justice Burger's argument in *Furman* failed to persuade Justices Douglas, Stewart, or White, whose opinions may be read as calling for standards that guide jury discretion and therefore presumably prevent the arbitrary, discriminatory, or infrequent imposition of the death penalty.

54. *See Furman,* 408 U.S. 255-57 (Douglas, J., concurring); *id.* at 291-96 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313-14 (White, J., concurring); *id.* at 315-16 (Marshall, J., concurring).

question, it is helpful to examine the writings of Kenneth Culp Davis,[55] Mortimer R. Kadish and Sanford H. Kadish,[56] and Ronald Dworkin.[57]

For Davis, a public officer has discretion "whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction. . . . [D]iscretion is not limited to what is authorized or what is legal but includes all that is within 'the *effective* limits' on the officer's power."[58] This definition is similar to what Dworkin calls *weak discretion*, where "the standards an official must apply cannot be applied mechanically but demand the use of judgment."[59] According to Davis, discretion may mean "beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness."[60] Thus, like several Justices in *Furman*, Davis recognizes that discretion is necessary to promote individualized justice. However, he also recognizes the need to eliminate unnecessary discretion. Davis states, "[W]e should eliminate much unnecessary discretionary power and . . . we should do much more than we have been doing to confine, to structure, and to check necessary discretionary power."[61] Davis seeks a balance between discretion and rules.[62] He argues there must be some decision making outside the rule of law.

> The total exclusion of judicial discretion by legal principle is impossible in any system. However great is the encroachment of the law, there must remain some residuum of justice which is not according to law—some activities in respect of which the administration of justice cannot be defined or regarded as the enforcement of the law.[63]

All five Justices in the *Furman* majority wanted to prevent decision making outside the rule of law. Justices Brennan and Marshall contended that since the total exclusion of judicial discretion is impossible in any system, and since discretion has the potential to be abused, resulting in arbitrary or discriminatory imposition of the death pen-

55. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

56. MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES (1973).

57. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

58. DAVIS, *supra* note 55, at 4.

59. DWORKIN, *supra* note 57, at 31. Dworkin also discusses strong discretion, which occurs when "[a]n official's . . . decision is not controlled by a standard furnished by the particular authority." *Id.* at 33.

60. DAVIS, *supra note* 55, at 3.

61. *Id.* at 3-4.

62. *Id.* at 15, 27, 42. Gregg v. Georgia, 428 U.S. 153 (1976), *infra* Part III, espoused this same balancing idea. Yet by the time the Court reached McCleskey v. Kemp, 481 U.S. 279 (1987), the scale had been tipped in favor of discretion at the expense of rules.

63. DAVIS, *supra* note 55, at 17-18 (quoting SALMOND ON JURISPRUDENCE 44 (Glanville Williams ed., 11th ed. 1957)).

alty, the death penalty should be abolished for all crimes and under all circumstances.[64] While Justices Douglas, Stewart, and White were opposed to decision making outside the rule of law, they believed discretion could be channeled to prevent juries from making arbitrary or discriminatory decisions.[65]

Like Justice Stewart in *Gregg,* and Justice Powell in *McCleskey,* Davis argues society should be searching for the optimum breadth of discretionary power. When discretionary power is too broad, justice may suffer from arbitrariness or inequality. When it is too narrow, justice may suffer from insufficient individualization. A rule is undesirable when discretion would be better. However, broad discretion should be curbed.[66]

Davis argues protection can be found by confining, structuring, and checking discretion.[67] Davis defines *confining* as "fixing the boundaries and keeping discretion within them."[68] While this may seem tautological because discretion, by definition, means to operate outside of prescribed boundaries, Davis argues, "[s]tatutes which delegate discretionary power often fix some of the boundaries but leave others largely open."[69] According to Davis, "[Legislatures] usually do about as much as they reasonably can do in specifying the limits on delegated power."[70] Davis concludes such vagueness leads to unnecessary discretion.[71]

Kadish and Kadish argue some officials exercise discretion despite the clarity of the statutes.[72] This discretion is called *deviational discretion* because it deviates from the prescribed boundaries.[73] Although what Dworkin labels *strong discretion*[74] differs from deviational discretion, it produces the same result—officials making decisions

64. Furman v. Georgia, 408 U.S. 238, 303-06 (1972) (Brennan, J., concurring); *id at* 362-71 (Marshall, J., concurring).

65. *See supra* note 54 and accompanying text. Dworkin disagrees with Davis, on the one hand, and Justices Douglas, Stewart, and White, on the other. In critiquing the legal positivist view of judicial discretion and legal obligation, he contends that legal obligations should not be imposed upon people by either weak or strong discretion. Instead, he asserts that judges must rely on some principle or established rule in enforcing legal obligations on people. DWORKIN, *supra* note 57, at 44.

66. DAVIS, *supra* note 55, at 52.

67. *Id.* at 54-55.

68. *Id.* at 55.

69. *Id.* An example of a vague statute can be found in the Georgia capital sentencing system in Godfrey v. Georgia, 446 U.S. 420 (1980), where the Court invalidated a death sentence imposed for a murder that the Georgia Supreme Court found was "outrageously or wantonly vile, horrible and inhuman." *Id.* at 428 (footnote omitted). In overturning the sentence, the *Godfrey* Court recognized that almost any jury would find a murder outrageous or inhuman. *Id.* at 428-29.

70. DAVIS, *supra* note 55, at 55.

71. *Id.* at 219.

72. KADISH & KADISH, *supra* note 56, at 44-45.

73. *Id.* at 42.

74. *Strong discretion* occurs where "on some issue [the official] is simply not bound by standards set by the authority in question." DWORKIN, *supra* note 57, at 32.

outside the law.[75] In a death penalty context, deviational or strong discretion supports the Brennan-Marshall position that if a jury can make decisions outside the law, or the jury's discretion is simply not bound by any standards, the potential for arbitrariness or discrimination is present. If the potential for arbitrariness and discrimination is present in the imposition of the death penalty, then the death penalty should be abolished.

Assuming discretion *can* somehow be confined, Davis argues this discretion must be structured within clearly defined boundaries. The purpose of structuring is to "control the manner of the exercise of discretionary power within the boundaries, and this, too, can be accomplished through statutory enactments."[76] In essence, rules specify limits of official action and, in that sense, structure discretionary power.[77] Structured jury discretion is consistent with the positions of Justices Douglas, Stewart, and White, in that once jury discretion is confined, rules or standards can be developed that will channel the jury's discretion. Thus, it can be argued that channeling or structuring jury discretion greatly diminishes, or even eliminates, the potential for abuse.

This argument, however, ignores the fact that inherent in exercising discretion (even if it is confined) is the official's ability to *interpret* the rules. Rules prescribing limits on an official's authority are useless unless such rules are clear and unambiguous. One can argue that language speaks for itself and needs no interpretation. Davis, however, rejects this view.[78]

After confining and structuring discretion, the last step, according to Davis, is to check discretion.[79] This means one officer should check another. Davis asserts this checking function is most effective when limited to the correction of arbitrariness or illegality, and least effective when attempting a *de novo* review because "a *de novo* determination may itself introduce arbitrariness or illegality for the first time and not be checked."[80]

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75. *Id.* at 32-33.

76. DAVIS, *supra* note 55, at 97.

77. *Id.*

78. The Court in Gregg v. Georgia, 428 U.S. 153 (1976) also rejected the mechanical application of the rules. The Justices, in upholding guidelines that purported to structure discretion, embraced Davis' position that rules, policy statements, and guidelines are all ways of structuring discretion and for helping the official exercise his discretion in a regular, non-arbitrary fashion. *Id.* at 195.

79. DAVIS, *supra* note 55, at 142.

80. *Id.* This restriction on review is important because Justice Stevens argued in McCleskey v. Kemp, 481 U.S. 279 (1987), that it was appellate courts that should when necessary carry out *de novo* review. *Id.* at 367 (Stevens, J., dissenting). However, as Davis demonstrates, *de novo* review is neither a possible nor desirable function of appellate review. Thus, if discretion is not controlled or guided, and mistakes cannot be corrected on appeal, circumstances are as they were at the time of *Furman*.

Davis' checking principle may not be an adequate safeguard because it ignores both Kadish and Kadish's deviational discretion and Dworkin's definition of weak discretion, where "some official has final authority to make a decision and cannot be reviewed and reversed by any other official."[81] In a capital case, a jury can decide to sentence a defendant to death. This weak discretionary decision by the jury escapes review by other judicial actors. Additionally, under a mandatory death penalty statute, a jury may exercise deviational discretion to find a defendant guilty of a lesser-included offense, or acquit an ostensibly guilty defendant, rather than sentencing him to death.[82]

Confining, structuring, and checking, argue Kadish and Kadish, may actually encourage discretion.[83] They believe a *role agent*, such as a trial judge or jury, is often required to use discretion in sentencing a criminal, but must set the sentence within certain statutorily prescribed limits, akin to the confines and structures advocated by Davis. "[S]ometimes role constraints may specifically demand the exercise of discretion."[84] Kadish and Kadish, however, believe confines and structures may narrow discretion too much, thereby encouraging a departure from the rules or standards.

According to Kadish and Kadish, deviational discretion entails not only "an official's deciding the substantive issue without the guidance of legal rules, but also his disregarding the answer provided by law in favor of his own judgment on the merits."[85] Jury nullification demonstrates how deviational discretion enables officials to determine whether to make the decision the law seems to require, or to fashion a different one. Deviational discretion is not equivalent to Dworkin's weak discretion. Nor is it discretion that necessarily escapes review of the official's exercise of judgment—though normally deviational discretion occurs when there is no such oversight. Most importantly, it is not even discretion in the stronger sense where "on some issue [the official] is simply not bound by standards set by the authority in ques-

This means the same risk of arbitrariness and discrimination exists, and therefore the death penalty should be abolished.

81. DWORKIN, *supra* note 57, at 32.

82. This situation describes the phenomenon known as "jury nullification." *See, e.g.,* Woodson v. North Carolina, 428 U.S. 280, 302-03 (1976) and Roberts v. Louisiana, 428 U.S. 325, 334-35 (1976). In these two cases, the Court invalidated mandatory death sentences on the basis of jury nullification problems. This in essence was the deviational discretion that Kadish & Kadish discussed. KADISH & KADISH, *supra,* note 56, at 42-45. Under the two statutes in question, if a jury convicted the defendant of first degree murder, the court automatically sentenced the defendant to death. The respective legislatures thought this method would prevent discretion. However, this method could only prevent *weak* discretion. The legislators failed to consider deviational discretion where the jury refused to convict the defendant, despite the fact that the evidence indicated they should.

83. KADISH & KADISH, *supra* note 56, at 43.

84. *Id.* at 21.

85. *Id.* at 43-44.

tion."[86] In exercising deviational discretion, the official *is* bound, either to some specific rule or policy, or to functioning within a prescribed discretionary range of action.[87]

Interestingly, Kadish and Kadish believe where discretion is exercised, it should be deviational, not delegated. If discretion is deviational, officials will resort to it only on a very selective basis. When discretion is delegated rather than deviational, it will be more widely exercised by officials and more often perceived by citizens as a sanctioned legal response that may serve to legitimize rule departures.[88]

A mandatory death sentencing statute results in deviational discretion, while guided discretion statutes naturally engender guided discretion. Justices Douglas and Stewart argued for the delegation of discretion.[89] If mandatory death sentencing statutes prevailed, deviational discretion would occur, and Kadish and Kadish argue this discretion would rarely be exercised.[90] Conversely, if discretion is delegated, by its very definition it will be regularly used. Justices Douglas and Stewart wanted discretion to be employed, but like Davis, they wanted to see it confined, structured, and checked.

We have examined three kinds of discretion; strong, weak, and deviational. Pre-*Furman* juries exercised strong discretion.[91] The *Furman* Court addressed discretion and its potential for abuse. In *Furman*, the Court moved from strong discretion to weak discretion by favoring confining, structuring, and checking discretion, a move culminated in *Gregg v. Georgia.*[92]

III. THE NEW DEATH PENALTY STATUTES

Four years after *Furman,* the United States Supreme Court undertook the task of ruling on state capital punishment statutes designed to cure the defects identified in *Furman.*[93] In a series of 1976 cases,

86. DWORKIN, *supra* note 57, at 32.

87. For example, even if a juror was bound by the evidence to convict a defendant of first degree murder, the juror may choose aquittal instead because he did not want to see the defendant executed. Similiarly, if a juror was bound by law not to consider the race of a defendant or victim in reaching a decision, but believed a black defendant with a white victim should be sentenced to death, he might vote accordingly. In both instances, the juror was bound by rules, but chose to ignore them. He deviated from the rules and followed his conscience.

88. KADISH & KADISH, *supra* note 56, at 152.

89. Justice White favored mandatory statutes because they ensured the death penalty would not be imposed arbitrarily or discriminatorily. *See* Roberts v. Louisiana, 428 U.S. 325, 350 (1976) (White, J. dissenting).

90. KADISH & KADISH, *supra* note 56, at 44.

91. For an in-depth analysis of the history of capital punishment jurisprudence prior to *Furman*, *see* Furman v. Georgia, 408 U.S. 238, 241-300 (Douglas, J., concurring).

92. 428 U.S. 153 (1976).

93. Immediately following the *Furman* decision, thirty-five states and the federal government re-enacted death penalty statutes. *See* THE DEATH PENALTY IN AMERICA, *supra* note 36, at 32-34 tbl. 2-1-1. The statutes that emerged could be clas-

the Court approved several state capital punishment statutes while invalidating others. The Court upheld statutes allowing for guided discretion, but struck down mandatory sentencing schemes.[94] In *Gregg,* the Court tried to develop a rationale designed to serve the two-fold purpose of saving both the death penalty and its *Furman* decision.[95] To this end, the Court, speaking through Justice Stewart, argued the death penalty is *per se* constitutional for five reasons: 1) it has been historically accepted by society; 2) it comports with human dignity; 3) it expresses and channels society's outrage; 4) it is consistent with federalism; and 5) death is not a disproportionate penalty for murder.[96]

Having determined capital punishment comports with constitutional mandates, the Court identified a set of guidelines that, in its judgment, adequately guided and channeled jury discretion.[97] In so doing, the Court completed the move from strong discretion to weak discretion begun in *Furman.*[98] In *Roberts v. Louisiana*[99] and *Woodson v. North Carolina,*[100] the Court rejected mandatory sentencing because the statutes in question did not provide guidelines for the jury and brought about deviational discretion in the form of jury nullifica-

sified into four general categories: those that listed aggravating circumstances only (like Georgia); those that listed aggravating and mitigating circumstances (like Florida); those that were quasi-mandatory (like Utah); and those that were mandatory (like Louisiana and North Carolina). *Id.* at 206-07. The aggravating only statutes required the jury to find at least one aggravating circumstance before recommending the death penalty. *Id.* at 206. The jury was not required to choose the death penalty, but the judge had to sentence the defendant to death if the jury recommended it. *Id.* The aggravating and mitigating statutes required the sentencing authority to weigh those circumstances against each other before deciding whether to impose the death penalty. *Id.* at 206-07. Unlike the aggravating only statutes, however, the judge was not required to follow the jury's recommendation. *Id.* at 207. The quasi-mandatory statutes required a jury impose the death penalty whenever it found at least one aggravating and no mitigating circumstance. Mandatory statutes required the jury to impose the death penalty on anyone convicted of first degree murder.

94. The Court upheld state statutes in Gregg v. Georgia, 428 U.S. 153 (1976), Proffitt v. Florida, 428 U.S. 242 (1976), and Jurek v. Texas, 428 U.S. 262 (1976). The Court held statutes unconstitutional in Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976). *Gregg* and its companion cases were atypical with respect to the race of the victim, for while half of the nation's homicide victims are black, all of the victims in these cases were white.

95. *Gregg,* 428 U.S. at 168-69. This author focuses on *Gregg* only because first, it arose from the same jurisdiction as *McCleskey*, the case in which the United States Supreme Court clearly rejected the argument that the death penalty was "cruel and unusual punishment" because it was imposed arbitrarily or discriminatorily. *Id.* at 169. Second, the constitutional issues decided in *Gregg* address the issues in its companion cases.

96. *Gregg*, 428 U.S. at 176-187.

97. *Id.* at 188-95.

98. This move is significant because the Court assumed discretion can indeed be confined, structured, and checked in a way that would allow the Justices to save the death penalty and to comport with the decision in *Furman.*

99. 428 U.S. 325 (1976).

100. 428 U.S. 280 (1976).

tion.[101] *Furman*, however, can be interpreted to *require* mandatory death sentences as an alternative to the Georgia statute in question.[102]

Justice Stewart began his *Gregg* opinion by noting capital punishment was historically accepted by society and the Framers of the Constitution.[103] He relied on the Fifth Amendment mandate that "[n]o person shall be held to answer for a *capital*, or otherwise infamous crime . . . nor shall any person be subject for the same offense to be twice put in jeopardy of *life* or limb . . . nor be deprived of *life*, liberty, or property."[104] He also cited the Fourteenth Amendment requirement that "no State shall deprive any person of '*life*, liberty, or property' without due process of law."[105]

Instead of relying upon the history and language of the Constitution to confirm society's wide acceptance of the death penalty, the Court should have looked at the evolving standards of decency.[106] Such standards are an important component of the Eighth Amendment, as stated in *Furman,* and could have been used by the Court to weigh

101. *See* Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 408 U.S. 325 (1976).

102. Lung-Shen Tao, *The Constitutional Status of Capital Punishment: An Analysis of* Gregg, Jurek, Roberts, *and* Woodson, 54 U. DET. J. URB. L. 345, 347 (1977). At least two Justices in *Furman* realized the mandatory death sentence might be used by states as a substitute for the Georgia-type statute. Justice Douglas recognized the problem but did not discuss it, *see* Furman v. Georgia, 408 U.S. 238, 257 (1972) (Douglas, J., concurring), and Chief Justice Burger implied he would be opposed to a mandatory death statute, *id.* at 401-02 (Burger, C.J., dissenting). Furthermore, Justice White's opinion focused on the infrequent imposition of the death penalty and that mandatory death sentences normally increased the frequency of death sentences. *Id.* at 311-14 (White, J., concurring).

103. *Gregg*, 428 U.S. at 176-77. In *In re* Kemmler, 136 U.S. 436 (1890), Chief Justice Fuller stated that "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there [is] something inhuman and barbarous,—something more than the mere extinguishment of life." *Id.* at 447. In Trop v. Dulles, 356 U.S. 86 (1958), Chief Justice Warren stated,

> Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.

Id. at 99.

104. *Gregg*, 428 U.S. at 177 (quoting U.S. CONST. amend. V) (emphasis added).

105. *Id.* at 177 (quoting U.S. CONST. amend. XIV) (emphasis added).

106. Justice Brennan rejected as superficial the argument that the Bill of Rights reference to capital crimes and the 'price of life,' demonstrated that the framers intended the death penalty to be a fundamental and perpetual form of punishment. *See* William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 324 (1986). Instead, Justice Brennan argued the framers "sought to ensure that *if* there was capital punishment, the process by which the accused was to be convicted would be especially reliable." *Id.* "[The Fifth Amendment] does not, after all, declare that the right of the Congress to punish capitally shall be inviolable; it merely requires that when and if death is a possible punishment, the defendant shall enjoy certain procedural safeguards." *Id.* (citing Furman v. Georgia, 408 U.S. at 238, 283 (Brennan, J., dissenting)).

public sentiment regarding the death penalty.[107] In *Gregg*, Justice Stewart asserted, since thirty-five states and the federal government re-enacted death penalty statutes after *Furman,* the public must support capital punishment.[108]

After establishing that society historically accepted the death penalty, and thus the death penalty comported with evolving standards of decency, Justice Stewart argued that capital punishment served society in two ways—retribution and deterrence.[109] He linked these two purposes to human dignity. Stewart argued that social order, and in turn human dignity, will be threatened in the absence of capital punishment. Stewart's concern stems from a belief that the lack of capital punishment provokes vigilantism.

> [C]apital punishment is an expression of society's moral outrage at particularly offensive conduct. . . . [Retribution is] neither . . . a forbidden objective nor one inconsistent with our respect for the dignity of men. . . . [I]ndeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.[110]

The problem with Justice Stewart's argument is that society may find the murder of a white person by a black person morally outra-

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107. *See* Justice Marshall's concurring opinion in *Furman,* where he argued that an informed public—one that knows how the death penalty is used discriminatorily against the powerless in American society—would abhor the death penalty and call for its abolishment. 408 U.S. at 363-64.

108. *Gregg,* 428 U.S. at 179-80. Justice Stewart also examined the jury to gauge public acceptability of the death penalty. *Id.* at 181. He referred to his opinion in *Witherspoon* where he said, "one of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.' " Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968). This examination of the 'evolving standards of decency' seemed to reject Justice Marshall's hypothesis as stated in *Furman. See Furman,* 408 U.S. at 360 (Marshall. J., concurring).

109. In his critique of Justice Stewart, Tao says the *Gregg* Court "recognizes the presence of retribution in society and concludes that retribution is 'essential' for an ordered society." Tao, *supra* note 102, at 354. According to Tao, the Court reasoned that without the death penalty, people would become vigilantes. Tao asserts this is specious because imprisonment has not been shown to be any less retributory than death. *Id.*

In critiquing the deterrence argument, Justice Brennan in *Furman* argued,

> Proponents of [deterrence] necessarily admit that its validity depends upon the existence of a system in which the punishment of death is invariably and swiftly imposed. Our system, of course, satisfies neither condition. A rational person contemplating a murder or rape is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future. The risk of death is remote and improbable; in contrast, the risk of long-term imprisonment is near and great.

Furman, 408 U.S. at 302 (Brennan, J., concurring).

110. *Gregg,* 428 U.S. at 183-84 (footnotes omitted) (citations omitted).

geous and an affront to humanity. Since juries have weak discretion to impose capital punishment, the death penalty can be assessed solely because a defendant is black and a victim is white.[111] In certain circumstances, the murder of a black person by another black person or by a white person might not provoke social outrage. Consequently, if society is not outraged, a defendant with a black victim might not receive the death penalty.[112] Thus, if society finds black defendant-white victim crimes to be the most outrageous, then unfettered jury discretion allows for prejudicial decision making.

Despite the possibility that racial considerations might influence jury decision making, the *Gregg* plurality declined to find the death penalty unconstitutional. Speaking through Justice Stewart, the Court relied on federalism considerations.

> [W]e cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.[113]

By relying on federalism precepts, the *Gregg* Court appeared to have undermined the Constitution's system of checks and balances. Further, the *Gregg* Court ignored the fact that some sectors of society may deem capital punishment necessary and suitable only, or in a dis-

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111. In Turner v. Murray, 476 U.S. 28 (1986), the Court overturned a death sentence.

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate .... [A] juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors.... Fear of blacks ... might incline a juror to favor the death penalty.

Id. at 35 (footnote omitted).

112. Professor Stephen Carter argues,

> The juries that over time punish black people who kill white people far more harshly than black people who kill black people are making statements about the value of black lives. When black people kill white people, something has occurred that must be deterred, something has happened that must be condemned. When black people kill each other, however, deterrence is ignored and retribution is forgotten.

Stephen L. Carter, *When Victims Happen to Be Black,* 97 YALE L.J. 420, 444 (1988); *see generally*, Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

113. *Gregg,* 428 U.S. at 186-87. As the Court said in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Id.* at 638.

proportionate number of cases, where there is a black defendant and/or a white victim.[114]

Justice Stewart recognized a capital punishment scheme must rationally distinguish between those who received death sentences and those who did not. However, noticeably absent from the plurality's opinion is any mention of *how* to discern, in a non-discriminatory manner, those sentenced to death from those spared. If the Georgia capital punishment statute cannot supply a rational basis for this distinction, application has regressed to the status it held in *Furman*, where Justice Stewart compared the inconsistency in imposing the death penalty to the likelihood of being struck by lightening.[115]

Justice Stewart used the second half of his *Gregg* opinion to demonstrate that Georgia's statutory treatment of the death penalty reduced jury discretion from strong to weak by confining, structuring, and checking it. "[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance."[116]

Justice Stewart contended a bifurcated system—guilt/innocence and punishment phases, and appellate review—are important components. However, in a disclaimer apparently intended to justify upholding the Texas statute in *Jurek v. Texas*,[117] he wrote, "[W]e do not intend to suggest that only the above-described procedures would be permissible under *Furman*."[118] Expressing satisfaction with the remedial effect of channeling jury discretion, he wrote,

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114. Professor Zeisel offers a possible explanation of this phenomenon, noting, "the crossing of social boundaries into tabooed areas within a society invokes the society's most punitive and repressive responses." Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 467 (1981). *See also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Thus, the death penalty might be reserved for the most taboo border crossings—a low status person's crime against a high status person—the expected pattern would be virtually no death penalties for murderers of blacks, some death penalties for murders of whites by whites (where the victims are of high status but the defendants are of low status), and the highest proportion of death penalties for murder of whites by blacks.

115. *See Furman*, 408 U.S. at 309 (Stewart, J., concurring).

116. *Gregg*, 428 U.S. at 195 (Stewart, J.).

117. 428 U.S. 262 (1976).

118. *Gregg*, 428 U.S. at 195 (Stewart, J.). Unlike the other statutes, the Texas statute did not provide for aggravating or mitigating circumstances, nor did it provide for appellate review. Instead, it required the jury to answer three very general questions. If the jury answered all three affirmatively, the death penalty was imposed.

> (1) [W]hether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

> [The jury] must find and identify at least one statutory aggravating factor before Justice Stewart may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines.[119]

While *Gregg* reinforces *Furman*'s emphasis on the importance of legislative guidance for capital punishment sentencing, it did not decide whether mandatory death penalty statutes are constitutional. In *Roberts* and *Woodson*, the Court struck down mandatory sentences because they did not allow enough weak discretion and allowed too much deviational discretion,[120] and therefore did not comport with the Eighth Amendment's commitment to individualized justice.

In *Woodson*, Justice Stewart wrote, "[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[121]

Without discretion, there is no room to introduce mitigating factors. Commenting on *Roberts* and *Woodson,* Michael Crowley asserts these cases "establish a Constitutional mandate for sentencing in capital cases requiring that the sentencer be permitted to consider mitigating circumstances in its determination of whether to impose the sentence

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> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Jurek v. Texas, 428 U.S. 262, 269 (1976) (citing TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon Supp. 1975)). Since most murders are committed with the intention that someone die, the answer was usually yes to question one. Question number three rarely came into play, thus only question number two remained to be answered.

The United States Supreme Court designated question number two as the appropriate time for the jury to consider mitigating factors. *Id.* at 272. The Court ruled there are many instances in the criminal justice system where future behavior is predicted, for example, the setting of bail and parole board decisions. *Id.* at 274-75. Yet, these analogies are ill-fitting, given the finality of death. The Court's reliance on those examples demonstrated its desire to allow statutes that provide for guided discretion to stand.

119. *Gregg,* 428 U.S. at 206-07 (Stewart, J.). *Circumscribed* seems to imply that within boundaries and despite guidelines, there might still be unbridled discretion. If the jury could still exercise strong discretion within a weak discretion framework, the potential for abuse of the discretion in the form of discrimination was still present. Consequently, the infirmities condemned in *Furman* remained under *Gregg.*

120. Justice Stewart also relied upon the fact that historically, mandatory death penalties had been subject to jury nullification whereby the jury would acquit a defendant because it did not want to impose the death penalty. According to Justice Stewart, "[T]he practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid. . . . [There has been a] repudiation of automatic death sentences [by jurors]." Woodson v. North Carolina, 428 U.S. 280, 293 (1976) (Stewart, J.).

121. *Woodson,* 428 U.S. at 304 (citation omitted).

of death. Such a mandate helped to ensure that an individualized finding would, in fact, be made."[122]

In *Woodson*, Justice Stewart approved of a Georgia-type statute and criticized mandatory death penalty schemes for their "inadequacy of distinguishing between murderers solely on the basis of legislative criteria narrowing the definition of the capital offense"[123] and recognized that juries may find mandatory death sentences so unpalatable as to return patently unjustifiable verdicts.[124] This, Justice Stewart said, "led the States to grant juries sentencing discretion in capital cases."[125] According to one author, the *Gregg* Court also recognized, "jury misbehavior in mandatory systems was the direct result of the jury's lack of *any* discretion not to return a death sentence. Under guided discretion systems, jurors don't have to ignore the standards to be merciful—the guiding factors, if anything, enhance their consideration of evidence supporting mercy."[126]

However, as Justice Powell acknowledged in *McCleskey,* "the power to be lenient [also] is the power to *discriminate.*"[127] By giving juries discretion to be merciful, the Court also gave juries the power to discriminate. This power allows a jury to impose the death penalty because the defendant is black and the victim is white or, conversely, to withhold the death penalty in cases where the victim is black and the defendant is black or white. Despite this acknowledgment, the Court purported where there is *no* discretion a jury acts lawlessly, and conversely, where there is discretion, a jury acts in accordance with guidelines. This logic created a major discrepancy between *Gregg* and *Woodson.* In *Gregg,* juries were trusted to conscientiously weigh aggravating and mitigating circumstances in a nonarbitrary manner. In *Woodson*, however, the Court found juries could not be trusted to vote for conviction based solely on the evidence because many would arbitrarily vote for acquittal to avoid imposing the death penalty.[128]

In *Gregg* and *Woodson,* the Court tried to strike a balance between discretion, which yields individualized treatment, and standards that guide or channel discretion and prevent arbitrariness or discrimina-

122. Michael J. Crowley, *Jury Coercion in Capital Cases: How Much Risk Are We Willing to Take?*, 57 U. CIN. L. REV. 1073, 1077 (1989).

123. *Woodson*, 428 U.S. at 291.

124. *Id.* at 290-91.

125. *Id.* at 291.

126. Scott Burris, Note, *Death and a Rational Justice: A Conversation on the Capital Jurisprudence of Justice John Paul Stevens*, 96 YALE L.J. 521, 530 (1987) (citing *Gregg*, 428 U.S. at 197-98).

127. McCleskey v. Kemp, 481 U.S. 279, 312 (1987) (Powell, J.) (alterations in original) (emphasis added) (quoting KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 170 (1969)).

128. *Woodson,* 428 U.S. at 293-94, 302-03.

tion.[129] The Court found statutes providing for guided discretion, which require the sentencing body to focus on specific circumstances of the crime and the character of the defendant, minimize the risk that the death penalty will be imposed arbitrarily.[130] Further, the Court viewed appellate review as protection that ensured every such case could be meaningfully distinguished from those where the jury declined to impose the death penalty.[131] The *Furman* Court interpreted human dignity to require a principled application of the death penalty.[132] In *Gregg,* the Court interpreted human dignity as requiring individual consideration of the nature of the offense and the character of each offender.[133] In so doing, the *Gregg* Court suggested that it is possible to explain, in terms of human dignity and society's standards of decency, why the death penalty is inflicted upon one murderer and not another.[134]

129. *See* DAVIS, *supra* note 55, at 15, 27, 42. Davis argues for a balance between discretion and rules because discretion is necessary for individualization of cases and rules are used to confine, structure, and check this discretion.

130. *See* Gregg v. Georgia, 428 U.S. 153, 192-95 (1976); Proffitt v. Florida, 428 U.S. 242, 251-52 (1976); and Jurek v. Texas, 428 U.S. 262, 278-79 (1976) (White, J., concurring).

131. *See, e.g., Proffitt,* 428 U.S. at 253. While the Court's efforts to guide jury discretion were commendable, the Justices only focused on sentencing discretion in the weak sense and sought only to confine, structure, and check it. Thus, despite its recognition that strong discretion is exercised by the executive branch on numerous occasions in both pretrial and post-trial stages of the criminal process, the Court remained unwilling to broaden its focus and refused to find in *Furman* a prohibition against non-sentencing discretion.

In subsequent cases, the Court continued to refuse to extend guidelines to non-sentencing discretion, despite the fact many authors contend that even if arbitrariness and caprice are removed from sentencing discretion, non-sentencing discretion can still produce such iniquitous results. For example, Bedau says, "[t]he unreviewable reservoir of prosecutorial discretion remains the chief bastion of the older practice and so far has proven immune to every criticism on constitutional grounds." Hugo Bedau, Gregg v. Georgia *and the "New" Death Penalty,* 4 CRIM. JUST. ETHICS 3, 12 (1985). According to Charles Black, the prosecutor makes all of the decisions on what crime to charge. CHARLES BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 38 (2d ed. 1981). "This decision is within large limits 'discretionary'—subject to no clearly statable rule, but formed . . . on the basis of an open-ended series of factors." *Id.* The Honorable James R. Browning says, "State and local prosecutors are generally elective officials, necessarily sensitive to political considerations." James R. Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth,* 9 GONZ. L. REV. 651, 685 (1974). These authors all point to the fact that if the prosecutor has strong discretion in capital cases and is motivated by political considerations and the desire to win re-election, then it is conceivable that in a state like Georgia where the electorate is overwhelmingly white (and thus, the jury pool as well) the prosecutor might consistently indict for first degree murder black defendants with white victims to improve his chances of victory at the polls and in the courtroom. Once a first degree murder is handed down, these defendants are eligible for capital punishment.

132. *Furman,* 408 U.S. at 270 (Brennan, J., concurring).

133. *Gregg,* 428 U.S. at 173, 206.

134. *Id.* at 173, 197-98. In McGautha v. California, 402 U.S. 183 (1971), Justice Harlan admonished that "[t]o identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express

The United States Supreme Court expected the balance between discretion and standards to yield a rational distinction between individuals who receive the death penalty and those who do not. The Court, however, never allowed this balance to operate effectively. Starting with *Lockett v. Ohio,*[135] the Court eviscerated these standards to a point where it changed the very purpose, and thus the effect, of *Gregg*-type standards.

IV. THE EVISCERATION OF *GREGG*-TYPE SAFEGUARDS

In *Lockett,* the Court began a retreat from the efforts to guide jury discretion that were initiated in *Gregg.* Effectively, this retreat returned the Court to its position in *Furman.* In *Furman,* however, five Justices found the death penalty unconstitutional because states imposed it arbitrarily and infrequently.[136] Theoretically, to retreat from weak jury discretion to strong, and thereby reintroduce the possibility of discriminatory or arbitrary imposition of the death penalty, is unconstitutional under *Furman.* Consequently, the Court's retreat can be read to reinstate the death penalty which, by its own holding, is unconstitutional in its operation.

Robert Weisberg states, "[T]he Supreme Court essentially announced that it was going out of the business of telling the states how to administer the death penalty."[137] By restoring strong discretion to the jury and eschewing its role as regulators of the death penalty, the Court sent a message to the states—if a death penalty statute appears to be constitutional, the Court will assume it is, regardless of its application.

Comparing the Court's role of managing capital punishment to the wriggling performance of an exotic dancer, Jeremy Rabkin wrote,

> [S]tartled perhaps by the hooting after *Furman*, the Court in *Gregg* shifted its scanty costume to recover a bit more modesty—but refused to stop the music or end the act. . . . The Court itself is now showing signs of weariness with this act and seems to be looking for a graceful exit.[138]

The Court's exit began in *Lockett*, where an Ohio jury convicted 21-year-old Sandra Lockett of capital murder for her role in the armed robbery of a pawnshop that left the shopkeeper dead. Lockett acted

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." *Id.* at 204.

135. 438 U.S. 586 (1978).

136. *Furman*, 408 U.S. at 255-57 (Douglas, J., concurring); *id.* at 291-96 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313-14 (White, J., concurring); *id.* at 315-16 (Marshall, J., concurring).

137. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 305 (1983).

138. Jeremy Rabkin, *Justice and Judicial Hand-Wringing: The Death Penalty Since* Gregg, 4 CRIM. JUST. ETHICS 18, 18 (1985).

as the accomplice by driving the vehicle used in the robbery.[139] Ohio's statutory felony-murder rule permitted the jury to find intent to kill on the part of an accomplice to a life-threatening crime.[140] Under Ohio law, Lockett was to receive a death sentence unless the trial judge found one of three statutory mitigating circumstances.[141] The trial judge concluded none of these mitigating factors existed.

On appeal, the plurality held the Ohio capital punishment statute constituted cruel and unusual punishment, insofar as it limited the jury to considering certain pre-determined mitigating factors.[142] The *Lockett* plurality insisted defendants must be allowed to introduce *any* consideration which might sway a jury toward mercy, and a jury must be allowed to give such considerations *any* weight it deems appropriate.[143] This renders nonsensical the idea that discretion must be standardized, since unlimited discretion to show mercy necessarily engenders unlimited discretion to withhold it.

Where a jury can consider *any* mitigating factors, and assign them *any* weight it chooses, jury discretion is not guided or channeled. Under such a system, a jury can exercise what amounts to unguided discretion. A jury can choose to ignore mitigating factors, or assign such factors so little weight as to ensure that they are not relevant. Thus, the *Lockett* Court moved from favoring weak discretion back to favoring strong discretion, "constitutionaliz[ing] a requirement of individualized sentencing for defendants facing the death penalty."[144]

The *Lockett* Court could have protected its efforts to create rational doctrinal rules for the death penalty, but only by sacrificing or limiting the principle of individualized justice. The Court's plurality opinion, echoing Davis' balancing argument, stated,

> Achieving the proper balance between clear guidelines that assure relative equality of treatment and discretion to consider individual factors whose weight cannot always be pre-assigned, is no easy task in any sentencing system. Where life itself is what hangs in the balance, a fine precision in the process must be insisted upon.[145]

The *Lockett* Court, like the Court in *Gregg* and its companion cases, ruled that sentencing discretion in death penalty cases need not be eliminated, only " 'directed and limited,' so that the death penalty

139. *Lockett*, 438 U.S. at 590-93.

140. *Id.* at 593.

141. *Id.* at 593-94. Ohio's statutory mitigating factors are: 1) whether the victim of the offense induced or facilitated it; 2) whether it is unlikely the offender acted under duress, coercion, or strong provocation; and 3) whether the offense was primarily the product of psychosis or mental deficiency insufficient to constitute legal insanity. OHIO REV. CODE §§ 2929.03-.04(B) (1975).

142. *Lockett*, 438 U.S. at 608.

143. *Id.* at 604.

144. Note, *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 102 (1978).

145. *Lockett*, 438 U.S. at 620 (Marshall, J., concurring).

would be imposed in a more consistent and rational manner."[146] In *Lockett*, Chief Justice Burger observed that the plurality in the 1976 cases recognized individualized sentencing is necessary "to ensure the reliability, under Eighth Amendment standards, of the determination that 'death is the appropriate punishment in a specific case.' "[147]

The *Lockett* Court's concern for individualized justice created tension between jury discretion and the *Gregg*-type standards designed to guide that discretion. The *Lockett* Court resolved this tension by emphasizing jury discretion at the expense of *Gregg*-type standards. Thus, as Robert Weisberg asserted, "[w]hile faithful to the legalist rhetoric of *Gregg*, the Court felt imprisoned by the moral demands of *Woodson*."[148] The *Lockett* Court, by concluding a state cannot limit the sentencer's power to identify mitigating factors, effectively restored much of the jury discretion the Court had previously attempted to restrict. Indeed, in his dissent, Justice White lamented that the Court had returned to its position in *Furman*.

> I greatly fear that the effect of the Court's decision today will be to compel constitutionally a restoration of the state of affairs at the time *Furman* was decided, where the death penalty [was] imposed . . . erratically. . . . By requiring as a matter of constitutional law that sentencing authorities be permitted to consider and in their discretion to act upon any and all mitigating circumstances. . . . invites a return to the pre-*Furman* days when the death penalty was generally reserved for those very few for whom society has least consideration.[149]

The *Lockett* Court thought its decision created a balance between individualized justice and racially neutral standards. In reality, *Lockett* marks the turning point where the Court began to favor individualization over equality.

Subsequently, in *Godfrey v. Georgia*,[150] the United States Supreme Court overturned a death sentence imposed for a murder under Georgia law the jury found "outrageously or wantonly vile."[151] In *Godfrey*, the petitioner murdered his estranged wife and his mother-in-law with a shotgun. The Georgia courts convicted Godfrey of murder and sentenced him to death.[152] The United States Supreme Court accepted his appeal. Justice Stewart wrote the plurality opinion in which Jus-

146. *Id.* at 601 (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976)).
147. *Id.* (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).
148. Weisberg, *supra* note 137, at 324.
149. *Lockett*, 438 U.S. at 623 (White, J., dissenting).
150. 446 U.S. 420 (1980).
151. *Id.* at 426. Section b(7) of the Georgia Code provides that a defendant convicted of murder may be sentenced to death if the offense is found to be beyond a reasonable doubt "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." GA. CODE ANN. § 27-2534.1(b) (7) (1978).
152. 446 U.S. at 426.

tices Powell, Stevens, and Blackmun joined.[153] The Court reversed the petitioner's sentence, finding the killings failed to meet the requirements of section b(7) of Georgia's death penalty statute.[154] However, the Court stopped short of striking down the statute. Instead, the Court found the Georgia Supreme Court had failed to provide for proper appellate review.[155] The *Godfrey* plurality recognized that any reasonable juror absent limiting instructions "could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible or inhuman,' " thereby meeting the requirements of section b(7).[156]

Nonetheless, the *Godfrey* Court did not expressly rule that a trial judge must clarify or define for jurors the statutory language.[157] If so, a trial judge could just simply quote the words of the statute.[158] In *Gregg*, Justice Stewart stated, "It is quite simply a hallmark of our

153. Justices Powell and Stewart voted together in all of the 1976 death penalty cases. In their view, the death penalty could be saved by strong discretion, guided by minimum standards. This view manifested itself in Powell's majority decision in McCleskey v. Kemp, 481 U.S. 279, 302-03 (1987).

154. *Godfrey*, 446 U.S. at 432-33.

155. *Id.*

156. 446 U.S. at 428-29. According to Charles Black,

> The concept of *mistake* fades out as the *standard* grows more and more vague. . . . There is no vagueness problem about the question "Did *Y* hit *Z* on the head with a piece of pipe?" It is very different when one comes to the question "Was the action of which the defendant was found guilty performed in such a manner as to evidence an 'abandoned and malignant heart'? . . . This question has the same grammatical form as a clear-cut factual question; actually, through a considerable part of its range, it is not at all clear what it means. It sets up, in this range, not a standard but a *pseudo-standard*. One cannot, strictly speaking, be *mistaken* in answering it, at least within a considerable range, because to be mistaken is to be on the wrong side of a line, and there is no real line here. But that, in turn, means that the 'test' may often be no test at all, but merely an invitation to arbitrariness and passion, or even to the influence of dark unconscious factors.

BLACK, *supra* note 131, at 27-28.

157. *Godfrey*, 446 U.S. at 429. The Court noted, "The standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically unstructed jury *in this case* was in no way cured by the affirmance of those sentences by the Georgia Supreme Court." *Id.* (emphasis added). The Court relied, however, on the state supreme court's role in affirming or reversing the sentence based on the weight of the evidence. The Court did not expressly require the trial judge to elucidate the statutory phrases. *Id.*

158. *Id.* at 426. Justices Marshall and Brennan, however, would have the decision stand for the proposition that,

> [t]he jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the *sentencer's* discretion that must be channeled and guided by clear, objective, and specific standards. To give the jury an instruction in the form of the bare words of the statute—words that are hopelessly ambiguous and could be understood to apply to any murder—would effectively grant it unbridled discretion to impose the death penalty. Such a defect could not be cured by the *post hoc* narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been

legal system that juries be carefully and adequately guided in their deliberations."[159] Rather than requiring more specific and careful jury instructions that might reduce jury discretion, the *Godfrey* plurality "apparently concluded that the power of the Georgia Supreme Court to review [sentences] constitutes an adequate safeguard against arbitrary imposition of the death penalty, provided that the court adheres to the guidelines enunciated [in prior cases]."[160]

The Court's reliance on appellate review to ensure fair application of the death penalty, however, is rife with problems. The effectiveness and fairness of appellate review of death sentences inherently relies on adequate scrutiny and balanced actions by appellate courts. The Georgia Supreme Court's recent record demonstrated its antipathy for the appellate review function in death penalty cases.[161] Georgia law provided that in such cases, the Georgia Supreme Court must determine whether the evidence supports a finding of a statutorily enumerated aggravating circumstance. Kathryn Riley says, "The Georgia Supreme Court, however, often dismisses its obligation with a cursory statement indicating that the evidence supports the finding. Review of the evidence has been delegated traditionally to the trial courts, which may explain the court's perfunctory performance."[162]

In *Godfrey*, Justices Brennan and Marshall, while concurring in the judgment, argued that appellate review was an insufficient safeguard.[163] Justice White also disagreed with the Georgia Supreme Court's factual conclusions as to *Godfrey*, but asserted the adequacy of the state court's review process, arguing against an expansive view of the Court's role in reviewing lower state court findings.[164] Addi-

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properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law.

Id. at 437 (citations omitted).

159. *Gregg*, 428 U.S. at 193.

160. Kathryn W. Riley, *The Death Penalty in Georgia: An Aggravating Circumstance,* 30 AM. U. L. REV. 835, 848 (1981). Appellate review is similar to what Davis calls "checking," where the administrator's (in this case the sentencing authority) discretion is reviewed by a higher authority, to ensure it was properly used and a fair result was reached. DAVIS, *supra* note 55, at 142.

161. Riley, *supra* note 160, at 850.

162. *Id.* at 850.

163. Godfrey v. Georgia, 446 U.S. 420, 436-37 (1980) (Marshall, J., concurring).

164. *Id.* at 449-51 (White, J. dissenting). Justice White said,

> The Georgia Supreme Court held that [the] facts supported the jury's finding of the existence of statutory aggravating circumstance . . . . A majority of this Court disagrees. But this disagreement, founded as it is on the notion that the lower court's construction of the provision was overly broad, in fact reveals a conception of this Court's role in backstopping the Georgia Supreme Court that is itself overly broad. Our role is to correct genuine errors of constitutional significance resulting from the application of Georgia's capital sentencing procedures; our role is not to peer majestically over the lower court's shoulder so that we might second-guess its interpretation of facts that quite reasonably—perhaps even quite plainly—fit within the statutory language.

tionally, this standard did not comport with the notion that decreasing the frequency of death sentences and executions moved the death penalty closer to unconstitutional application.[165] Justice Marshall argued no appellate review, federal or state, operated adequately to constitutionally redeem or validate the death penalty.[166] He believed the lapse in responsibility for its appellate function by the Georgia Supreme Court was systemic, not an aberration. If Justice Marshall was correct, then the Georgia Supreme Court's policing actions were insufficient to bring balance to the death penalty's application. Consequently, although Godfrey was lucky, under vague statutes such as Georgia's, defendants are subject to abuse of jury discretion in the form of discrimination or caprice, and without the appropriate level of appellate recourse.

Added to the Georgia Supreme Court's antipathy to review is *Lockett*'s acceptance of limitless mitigating factors, which makes meaningful appellate review extremely difficult, if not impossible.[167] The Georgia Supreme Court's perfunctory performance, combined with the *Lockett* ruling, weakens the *Godfrey* plurality's position that appellate review provides an adequate safeguard against unbridled sentencing discretion. According to Charles Black,

> [O]ur system . . . diffuse[s] this . . . responsibility [to impose the death penalty] nearly to the point of its elimination, so that each participant in this long process, though perhaps knowing his own conclusions to be uncertain and inadequately based on lawful stan-

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Id. at 449-50 (White, J., dissenting) (footnote omitted).

165. *See supra* part I. Several Justices believed too infrequent imposition of the death penalty weakened the argument that capital punishment served as a deterrent, or created a presumption of arbitrary application. *See* Furman v. Georgia, 408 U.S. 238, 255-57 (1972) (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 314 (White, J., concurring).

166. 408 U.S. at 367-69 (Marshall. J., concurring).

167. *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978). In Caldwell v. Mississippi, 472 U.S. 320 (1985), the Court said:

> Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed "[those] compassionate or mitigating factors stemming from the diverse frailties of humankind." When we held a defendant has a constitutional right to the consideration of such factors, we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses. . . .
>
> Given these limits, most appellate courts review sentencing determinations with a presumption of correctness.

Id. at 330-31 (citations omitted).

It is curious the appellate court reviewed sentencing with a presumption of correctness when, clearly, vague statutes like section b(7) leave great potential for discrimination and caprice at the trial level. Since the United States Supreme Court has held such language is not unconstitutionally vague, despite its great potential for abuse, appellate courts should presume nothing—least of all correctness—when reviewing sentencing determinations.

> dards, can comfort himself with the thought, altogether false and vain, that the lack has been made up, or will be made up, somewhere else.[168]

Thus, the greatest defect in Georgia's sentencing process, and where the greatest potential for abuse existed, was at the sentencing stage. The *Godfrey* plurality failed to investigate or determine whether there was a pattern of abuse at this stage in other section b(7) cases. If the statutory definition of an aggravating circumstance was vague, as in section b(7), and the trial judge failed to offer any explanatory instructions, the jury maintained unbridled (strong) discretion to construe the language as it wished, and find the aggravating circumstances necessary to justify imposition of the death penalty. This strong sentencing discretion is likely to result in the kind of arbitrary or discriminatory imposition of the death penalty condemned in *Furman,* and which the *Gregg* Court promised to remove.

In *Godfrey*, the Court relied on state appellate review to correct trial court mistakes. Four years later, however, in *Pulley v. Harris,*[169] the United States Supreme Court eviscerated this safeguard, finding the Eighth Amendment did not require a state appellate court to make a determination of proportionality by comparing the sentence in a death penalty case with sentences in similar cases.[170] The *Harris* Court concluded the California capital sentencing system provided other procedural safeguards sufficient to satisfy constitutional requirements.[171] Though *Harris* helped clarify which safeguards were required in capital punishment cases, it is questionable whether the holding responded to the Eighth Amendment concerns raised in *Furman* and subsequent cases.

In *Harris*, the jury convicted the petitioner of kidnapping, robbery, and two counts of first degree murder.[172] In accordance with the capital sentencing scheme then in effect in California, the jury found two special circumstances were proven beyond a reasonable doubt.[173] This made Harris eligible for the death penalty and required a subsequent special hearing for sentencing. At that hearing, the jury sen-

168. BLACK, *supra* note 131, at 104. Furthermore, in Caldwell v. Mississippi, 472 U.S. 320 (1985), the Court overturned a death sentence imposed by a jury that had been misled by the prosecutor to believe that their decision was not final and would go through a long process of appellate review. *Id.* at 325-26, 328-29.

169. 465 U.S. 37 (1984).

170. *Id.* at 45-46. A year earlier in Maggio v. Williams, 464 U.S. 46 (1983) (per curiam), the Court ruled that proportionality review need not be based on state-wide cases. *Id.* at 51-52. District case review sufficiently satisfied constitutional prescriptions. *Id.* at 52. The holding in this case delivered the first crippling blow to proportionality review, which met its final end in *Harris*.

171. *Harris,* 465 U.S. at 53-54.

172. *Id.* at 39 n.1.

173. *Id.* at 39. The jury found that Harris had been convicted of more than one offense of first degree murder and each offense was willful, deliberate, premeditated, and committed during the course of a kidnapping and robbery. *Id.* (citation omitted).

tenced Harris to death. The California Supreme Court affirmed the conviction. After a federal district court denied a writ of *habeas corpus,* the Ninth Circuit Court of Appeals ruled the writ should issue unless the California Supreme Court conducted a comparative sentencing proportionality review.[174] The United States Supreme Court reversed the Ninth Circuit, and reinstated Harris' death sentence.

Justice White's majority opinion began by acknowledging appellate review should ensure the punishment is *proportionate* to the crime. White acknowledged that "[t]raditionally, 'proportionality' has been used with reference to an abstract evaluation of the appropriateness of a sentence for a particular crime."[175] However, the Court rejected Harris' argument that courts must inquire whether a penalty in a particular case is unacceptable "because [it was] disproportionate to the punishment imposed on others convicted of the same crime."[176]

With many states adopting some form of proportionality review, the question of how to conduct the proper scope of such reviews arises. *Weems v. United States*[177] addresses the concern for proportionality review inasmuch as *Weems* held the punishment must be proportional to the offense.[178] Furthermore, in *Coker v. Georgia*,[179] the Court held the death penalty was unconstitutional because it is disproportionate punishment for the crime of rape.[180] In *Enmund v. Florida*,[181] the Court found the death penalty excessive after comparing the circumstances of the petitioner's case with similar circumstances of cases in other states.[182] In *Solem v. Helm*,[183] where the Court had to determine whether a recidivist who issued a "no account" check for $100 was subject to life imprisonment, the Court conducted a comparative proportionality review.[184] Stating the Constitution required the sentence to be proportional to the crime, the Court compared sentences imposed for the same crime in other jurisdictions, as well as sentences imposed on other criminals for different crimes in the same jurisdiction.[185] The *Solem* Court found the proportionality principle applicable to capital and non-capital cases.

174. *Id.* at 40-41.
175. *Id.* at 42-43.
176. *Id.* at 43.
177. 217 U.S. 349 (1910).
178. *Id.* at 366-67.
179. 433 U.S. 584 (1977).
180. *Id.* at 592.
181. 458 U.S. 782 (1982) (holding death penalty is unconstitutional when imposed for felony murder where defendant had no intent to kill or use lethal force in committing crime). *See also* Lockett v. Ohio, 438 U.S. 586 (1978) and Bell v. Ohio, 438 U.S. 637 (1978). All these cases involved situations in which the Court reversed the death sentences because an accomplice to a felony murder could not be sentenced to death without taking part in the murder.
182. *Enmund,* 458 U.S. at 789-93.
183. 463 U.S. 277 (1983).
184. *Id.* at 296-300.
185. *Id.* at 290, 298-300.

Despite these precedents, the *Harris* Court ignored a proportionality review requirement, arguing all that is necessary to meet the concerns of *Furman* is "a system that provides for a bifurcated proceeding at which [the] sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information."[186] The *Harris* Court relied on *Jurek v. Texas,* where a Texas statute provided no proportionality review, yet, in the Court's view, solved the problems identified in *Furman.*[187] Justice Brennan's dissent opined, "[T]he Court is simply deluding itself . . . when it insists that those defendants who have already been executed or are today condemned to death have been selected on a basis that is neither arbitrary nor capricious."[188] Justice Brennan noted the *Furman* Court was concerned primarily with discriminatory application of the death penalty and suggested racial prejudice remained at the heart of much capital sentencing.[189] Although Justice Brennan did not argue that the Court's precedents expressly required comparative proportionality review, he would have required such review "to eliminate some of the irrationality that currently surrounds imposition of a death sentence."[190] Proper proportionality review ensures juries impose the death penalty rationally according to statutorily defined criteria. In *Godfrey*, the Court relied on appellate review to correct deficiencies found at the trial level. In *Zant v. Stephens,*[191] the Court acknowledged the existence of strong discretion at the trial level and recognized that appellate review was a necessary safeguard to abuse.[192] An essential component of appellate review is proportionality review. If proportionality review is not required, then appellate review becomes an insufficient safeguard, rendering illogical the

186. Pulley v. Harris, 465 U.S. 37, 46 (1984) (quoting Gregg v. Georgia, 428 U.S. 153, 195 (1976)).

187. *Id.* at 48-50. In Jurek v. Texas, 428 U.S. 262 (1976), the Court held the death penalty statute complied with the *Furman* ruling and therefore met the constitutional requirements, despite the fact the statute did not provide for proportionality review. *Id.* at 276. By so holding, the Court attempted to show that since it found the Texas statute constitutional, then clearly proportionality review, rather than a requirement, acted as merely as an additional safeguard. However, this reasoning only demonstrated the Court's continued effort to remove itself as the regulator/enforcer of proper death penalty statutes. *See, e.g.,* Barefoot v. Estelle, 463 U.S. 880 (1983).

In *Barefoot*, the Texas statute required the jury to answer a question as to the recidivist proclivities of the defendant. *Id.* at 884. To demonstrate that the defendant would indeed be a repeat offender, the prosecutor introduced testimony from two psychiatrists who, in response to hypothetical questions, testified Barefoot would likely continue to represent a threat to society. *Id.* Despite the fact these psychiatrists never examined Barefoot, the United States Supreme Court allowed the testimony to stand. The message to the states is clear: As long as a statute looks constitutional on paper, the Court will not investigate its operation in practice.

188. *Harris,* 465 U.S. at 60 (Brennan, J., dissenting).

189. *Id.* at 67.

190. *Id.* at 71.

191. 462 U.S. 862 (1983).

192. *Id.* at 875.

Court's *Godfrey* and *Zant* rationales. Where strong discretion is exercised by the jury, and there is no proportionality review, the potential for abuse of discretion in the form of discrimination or caprice remains violative of *Furman*.

Irrational imposition of the death penalty was the infirmity that *Furman* recognized and *Gregg* hoped to eliminate. *Harris*, however, detracted from the emphasis those earlier cases placed on proportionality review. The *Harris* Court offered no explanation as to how an appellate court can, without examining other cases, determine whether the death penalty has been imposed discriminatorily, wantonly, freakishly, or so infrequently as to be cruel and unusual punishment.

The *Harris* Court reviewed California's death penalty scheme only to determine whether the punishment was proportionate to the crime, as if this type of proportionality was enough to minimize the risk that a jury might exercise discretion arbitrarily or capriciously. This view conflicted with *Gregg*, where the Court stated it would do *all* that was necessary to safeguard a defendant's rights.[193]

The scope of the review process authorized in *Harris*, while reducing the risk of arbitrariness or discrimination, fell short of fulfilling *Gregg*'s commitment to institute all necessary safeguards. Comparative proportionality review further reduces the risk of such occurrences. It is erroneous to define as optional a review process that enhances consistency and further minimizes caprice and discrimination, especially when such a definition is contrary to the tenor of *Furman* and *Gregg*.

193. The *Gregg* Court stated, "There is no question that death as a punishment is unique in its severity and irrevocability. When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187 (1976) (citation omitted). The Court continued, "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at 189. *See also* McCleskey v. Kemp, 481 U.S. 279 (1987), where the Court stated,

> "[T]here can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.' " Despite these imperfections, our consistent rule has been that constitutional guarantees are met when "the mode [for determining guilt or innocence] itself has been surrounded with safeguards to make it *as fair as possible*." . . . In light of the safeguards designed to *minimize racial bias* in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.

Id. at 313 (quoting Zant v. Stephens, 462 U.S. 862, 884 (1983) (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)), and Singer v. United States, 380 U.S. 24, 35 (1965), respectively) (emphasis added).

The most problematic aspect of *Harris* was the Court's unconditional willingness to accept the California scheme. The Court acknowledged it determined only that "[*o*]*n its face*, this system, without any requirement or practice of comparative proportionality review, cannot be successfully challenged under *Furman* and our subsequent cases."[194] As Ellen Liebman says, "[The] clear signal to the states [that provide for] proportionality and other types of review [is] the Court is interested in the form and not the substance of the procedure."[195]

Harris set the baseline for capital sentencing schemes designed to avoid arbitrariness resulting from excessive (strong) discretion while allowing individualized sentencing determinations. Now, death sentencing schemes must merely: 1) narrow the class of death eligible defendants on the basis of rational, objective criteria; 2) ensure that relevant factors in the sentencing determination be drawn to the attention of the judge or jury; and 3) require the judge or jury to weigh these aggravating and mitigating circumstances to determine if death is an appropriate penalty. Since the third factor here invokes open-ended balancing, the scheme subordinates the goal of consistency to that of individualization. *Zant* and *Harris* represented a major step in the Court's return to favoring strong sentencing discretion.

In *Zant*, the petitioner was convicted of murder.[196] At the sentencing hearing, the state argued its evidence established three aggravating circumstances identified in the Georgia capital sentencing statute.[197] The trial judge instructed the jury it could consider those statutory factors, if they were supported by the evidence, in deciding whether to impose the death penalty. The jury indicated it found two aggravating circumstances, and sentenced the defendant (Stephens) to death.[198] The Georgia Supreme Court upheld the death sentence, and the United States Supreme Court affirmed. Though Georgia's statutory aggravating circumstances served only to narrow the class of death-eligible individuals, the *Zant* Court ruled *Furman* did not require such standards to guide jury discretion in imposing the death penalty.[199]

The Georgia court employed, and the United States Supreme Court endorsed, a pyramid metaphor, where all murderers start at the base.[200] When a jury found the defendant guilty, the analysis moved

194. *Harris*, 465 U.S. at 53 (emphasis added).

195. Ellen Liebman, *Apellate Review of Death Sentences: A Critique of Proportionality Review*, 18 U.C. DAVIS L. REV. 1433, 1437 (1985).

196. Zant v. Stephens, 462 U.S. 862, 864 (1983).

197. *Id.* at 864-65.

198. *Id.* at 866.

199. *Id.* at 878.

200. *Id.* at 870-73. The Court recognized,

> The briefs on the merits revealed that different state appellate courts have reached varying conclusions concerning the significance of the invalidation

to the second level. The jury used aggravating factors to determine whether the defendant should move to the third level and become eligible for death.[201]

This pyramid-like analysis rationally determines who is eligible for the death penalty, but did not rationally address the actual sentencing. *Furman* and *Gregg* required a rational distinction between death-eligible defendants who are *sentenced* to death and death-eligible defendants who are not.[202] The effect of this, under *Zant*, was that once a Georgia jury found circumstances established the defendant's death eligibility, the system allowed it to consider all factors, including irrelevant ones such as the defendant's race, which amounted essentially to absolute jury discretion.[203] Merely ensuring a jury will closely examine circumstances does not require the jury to adhere to standards by which it may distinguish *rationally* between identically situated defendants, only some of whom the state should properly execute.[204] Indeed, in his concurring opinion in *Zant*, Justice Rehnquist contended that the jury rests its decision on "literally countless factors."[205] He argued the penalty judgment was an ineffable, subjective decision that did not require strict adherence to a formal model.[206] This is similar to Justice Powell's view that, "it is the jury's function to make the

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> of one of multiple aggravating circumstances considered by a jury in a capital case. Although the Georgia Supreme Court had consistently stated that the failure of one aggravating circumstance does not invalidate a death sentence that is otherwise adequately supported, [the Court] concluded that an exposition of the state-law premises for that view would assist in framing the precise federal constitutional issues presented by the Court of Appeals' holding. [The Court] therefore sought guidance from the Georgia Supreme Court pursuant to Georgia's statutory certification procedure.

Id. at 870 (footnote omitted). The Court's certified question was, "[w]hat are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?" 462 U.S. at 870 n.11. The Georgia Supreme Court responded with this pyramid analysis.

201. *Id.* at 870-73.

202. Burris, *supra* note 126, at 536.

203. According to Justice Douglas, "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. . . . Absolute discretion . . . is more destructive of freedom than any of man's other inventions." United States v. Wunderlich, 342 U.S. 98, 101 (1951) (Douglas, J., dissenting).

204. Burris, *supra* note 126, at 536.

> The third plane of the metaphor is the key element, identifying an unregulated final stage of the penalty trial in which the formal statutory character of the aggravating circumstances plays no role at all. Whether an aggravating circumstance is "statutory" only helps push a case through the second plane, into the third level. Once a defendant is in the third level, the formal statutory rubric does not even guide—much less restrain—the jury.

Weisberg, *supra* note 137, at 350.

205. Zant v. Stephens, 462 U.S. 862, 901 (1983) (Rehnquist, J., concurring) .

206. *Id.* at 894-95, 900-01.

difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.' "[207]

The views of Justices Powell and Rehnquist indicated the Court had come full circle, from favoring strong discretion in *Furman,* to weak discretion in *Gregg,* and back to strong discretion in *Zant.* Moreover, by conceding that strong discretion is largely unreviewable, the Court contradicted its *Godfrey* and *Harris* rationales. The *Zant* Court, by limiting the scope of the Eighth Amendment requirement that death penalty decisions reflect some balance between individualization, and equality and consistency, contradicted itself by committing such sentencing judgments to jury discretion, and removing them from the reach of federal appellate courts.[208] Moreover, the Court effectively emasculated the *Gregg* standard, which gave discretion to sentencing authorities so long as it was adequately guided.

In recognizing that most discretion exercised by juries is not controlled, the Court lost its basis for the crucial constitutional distinction between the arbitrariness condemned in *Furman* and the rationality proclaimed in *Gregg* and *Woodson.* In *Gregg,* the Court found jury discretion was necessary for individualized justice, and guidelines would prevent a jury from abusing this discretion. On this basis, the Court struck down the mandatory death sentences in *Woodson* because those statutes did not allow room for individualization. Indeed, in his *Zant* dissent, Justice Marshall complained the Court asked virtually nothing of the states that they were not doing before *Furman.*[209]

The Court's retreat from an expansive interpretation of *Furman*'s Eighth Amendment mandate demonstrated the difficulty in creating a capital punishment system that resolved, or successfully mediated, the contradiction between individualization and evenhandedness.[210] The point of critical importance to the Court was its simple demand that "any decision to impose the death sentence be, and appear to be, based on reason."[211] Therefore, the Court was destined to face a difficult choice. It could impose the death sentence so seldom that its very

207. McCleskey v. Kemp, 481 U.S. 279, 311 (1987) (quoting H. KALVEN & H. ZEISEL, THE AMERICAN JURY 498 (1966)). Since jury discretion in determining who shall die is not guided by any rational standards, proportionality review or any review cannot purport to infuse rationality into this irrational decision. Comparing irrational decisions to other irrational decisions does not yield rationality. Indeed, it is quite possible that some irrational components, like the victim's race, might *consistently* skew jury decisions. On review, even the most exacting assessment of an offender and an offense does not provide standards for the death decision.

208. Note, *The Supreme Court, 1982 Term,* 97 HARV. L. REV. 125 (1983).

209. *Zant,* 462 U.S. at 910-11 (Marshall, J., dissenting). Justice Marshall said, "The only difference between Georgia's pre-*Furman* capital sentencing scheme and the 'threshold' theory that the Court embraces today is that the unchecked discretion previously conferred in all cases of murder is now conferred in cases of murder with one statutory aggravating circumstance." *Id.* at 911.

210. *The Supreme Court, 1982 Term, supra* note 208, at 126.

211. Gardner v. Florida, 430 U.S. 349, 358 (1977).

use would be aberrational due to the judicial system's inability to attain the level of rationality mandated by its prior decisions. Conversely, the Court could overlook error and accept inconsistency by conferring strong discretion on the sentencing authority.[212]

The *Zant* majority opted to redefine the object of *Furman,* acquiescing to a sentencing procedure engendering neither the highest standards of reliability in decision making nor the exercise of discretion guided by clear and consistent criteria. The Court apparently thought it had created a workable capital punishment system notwithstanding less emphasis on the appellate process and acceptance of unguided jury discretion. However, the *Zant* Court's position ignored its responsibility for judicial line drawing, thus leaving the sentencing process subject to arbitrariness, caprice, and discrimination by not addressing the central issue—at what point, if any, does sacrificing consistency and equality for strong discretion and individualized justice become unacceptable? The United States Supreme Court answered this question in *McCleskey v. Kemp*,[213] where it rejected unequivocally the notion that the death penalty was unconstitutional even if broadly imposed in a prejudicial manner. In so doing, the Court chose to tolerate discrimination, opting for strong discretion and individualization over consistency and equality.

V. *McCleskey v. Kemp*

The question presented in *McCleskey v. Kemp* was whether a complex statistical study which indicated racial considerations entered the capital sentencing process made a *prima facie* case to hold a capital sentence unconstitutional under the Eighth or Fourteenth Amendment. The United States Supreme Court found the defendant's Eighth Amendment rights were not violated even where a study showed a sentencing disparity appeared to correlate with race; it did not necessarily follow there was a constitutionally significant risk of racial bias in Georgia's capital sentencing of a particular defendant. The Court held that McCleskey's Fourteenth Amendment rights were not violated because the Baldus study failed to establish that any of the decision makers in McCleskey's *own* case acted with specific discriminatory intent.[214] In *McCleskey,* the decision thus marked the end of an era in death penalty jurisprudence.

212. *The Supreme Court, 1982 Term, supra* note 208, at 126-27.

213. 481 U.S. 279 (1987).

214. In Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968), *vacated and remanded*, 398 U.S. 262 (1970), a petitioner submitted data to show discrimination against black offenders in rape cases, especially those with white victims. *Id.* at 141-44. The court refused to grant relief based on the statistics presented. The *Maxwell* court rejected this social scientific data as faulty because it did not demonstrate that petitioner's sentence was the product of specific acts of discrimination or discrimination by the jury that imposed it. *Id.* at 147. The *McCleskey* Court used this reasoning a decade

In rejecting McCleskey's claim of systemic race bias in capital punishment administration, the Court rejected the last major challenge to the death penalty in America. *McCleskey* appears to be the death knell for the anti-death penalty campaign. After *McCleskey,* all that remains is "small-scale tinkering with the details of [the death penalty's] administration and, of course, persistent claims in lower courts of specific errors in the multitude of cases where the sentence is imposed."[215]

Warren McCleskey was a black man convicted of murdering a white police officer.[216] The *McCleskey* jury, eleven whites and one black, found McCleskey guilty of murder.[217] In the penalty phase, under Georgia law, a jury could not consider imposing the death sentence unless it found beyond a reasonable doubt the murder was accompanied by one of several statutorily specified aggravating circumstances. The *McCleskey* jury found such aggravating circumstances: the murder was committed during the course of an armed robbery and the victim was a peace officer engaged in the performance of his duties. McCleskey offered no evidence to mitigate this aggravating circumstance. The jury recommended the death penalty.[218] The Georgia Supreme Court affirmed the conviction and the United States Supreme Court denied *certiorari.*

McCleskey filed a writ of *habeas corpus* in federal district court, alleging the Georgia death penalty was imposed in a racially discriminatory manner. He based his claim on statistics gathered as part of the Baldus study.[219] The study indicated black defendants who killed

later in rejecting McCleskey's Fourteenth Amendment claim. *McCleskey,* 481 U.S. at 292-93.

215. Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution,* 85 MICH. L. REV. 1741, 1741 (1987).

216. 481 U.S. at 283.

217. McCleskey v. Zant, 580 F. Supp. 338, 345-46, 369 (N.D. Ga. 1984).

218. In Gregg v. Georgia, 428 U.S. 153 (1976), the Court approved Georgia's capital punishment statute. *Id.* at 207. The statute provides for the following: a pre-sentence trial in front of the jury that finds the defendant guilty; automatic life sentence, unless the prosecutor seeks the death penalty at the sentencing phase; in cases where the prosecutor does seek the death penalty, the jury must find beyond a reasonable doubt the existence of one of several aggravating circumstances, and; if the jury sentences the defendant to death, after finding one of the aggravating circumstances existed, the sentence is automatically appealed to the Georgia State Supreme Court. *Id.* at 163-66.

219. The study, conducted by Professors David C. Baldus, Charles Pulaski, and George Woodworth, will hereinafter be referred to as the "Baldus" study. *Id.* at 286. The study is based on more than 2,000 murder cases that occurred in Georgia from 1973-78 and involves data relating to the victim's race and the defendant's race. *Id.* The authors controlled 230 variables which might have offered a nonracial explanation for the disparities found. *Id.* at 287. Baldus and his colleagues published their findings in several forms. *See* David C. Baldus et al., *Monitoring and Evaluating Temporary Death Sentencing Systems: Lessons From Georgia,* 18 U.C. DAVIS L. REV. 1375 (1985); David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience,* 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

whites have the greatest likelihood of receiving the death penalty, other factors notwithstanding. The district court questioned the validity of the study, and denied Eighth and Fourteenth Amendment relief.[220] On appeal, the Eleventh Circuit Court of Appeals assumed the validity of the study, but affirmed the district court's decision because the statistics were insufficient to show *when* arbitrariness or discriminatory intent in the imposition of the penalty occurred.[221] McCleskey appealed to the United States Supreme Court, which granted *certiorari.*

McCleskey made two arguments to the Court. First, McCleskey argued the Baldus study demonstrated discriminatory intent by Georgia in the imposition of its death penalty statute in violation of the Fourteenth Amendment's Equal Protection Clause. Second, McCleskey claimed his sentence was disproportionate to similarly situated defendants and the level of the jury's sentencing discretion allowed racial prejudices to improperly affect its decisions.[222]

Rejecting McCleskey's arguments, Justice Powell's majority opinion rested on two primary factors: (1) a desire to encourage sentencing discretion; and (2) the existence of "statutory safeguards."[223] Powell argued that for McCleskey to prevail under the Fourteenth Amendment, he must show there was discriminatory intent in Georgia's death penalty scheme *and* that such discriminatory intent affected his particular case.[224] McCleskey offered no such connection. He relied solely on the Baldus study as evidence that murderers of whites, and

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The results of the study indicated defendants charged with killing whites received the death penalty in 11% of the cases while defendants charged with killing blacks received the death penalty in 1% of the cases. *McCleskey*, 481 U.S. at 286. The death penalty was assessed in 22% of the cases with a black defendant and a white victim; in 8% of the cases with a white defendant and a white victim; in 1% of the cases with a black defendant and a black victim; and in 3% of the cases with a white defendant and a black victim.

The authors found that defendants charged with killing whites were 4.3 times more likely to receive the death penalty as defendants charged with killing blacks. Black defendants were 1.1 times more likely to receive the death penalty than other defendants. *Id.* at 286-87.

220. *See* McCleskey v. Zant, 580 F. Supp. 338, 379 (N.D. Ga. 1984).

221. *See* McCleskey v. Kemp, 753 F.2d 877, 898-99 (11th. Cir. 1985).

222. The disproportionality argument was grounded in cases such as O'Neil v. Vermont, 144 U.S. 323 (1892), where the Court held for the first time that the Eighth Amendment was concerned with proportionality and excessiveness. And in Weems v. United States, 217 U.S. 349 (1910), and Robinson v. California, 370 U.S. 660 (1962), where the Court invalidated a punishment because it was ruled that the punishment was disproportional to the crime committed. Further, discrimination in the imposition of the death penalty was violative of the Eighth Amendment as interpreted by Justice Douglas in *Furman.*

223. *McCleskey,* 481 U.S. at 302, 308.

224. *Id.* at 292.

black murderers, were the two groups most likely to receive a death sentence.[225]

To establish a *prima facie* case under a disparate impact analysis, a petitioner must show "the totality of the relevant facts give rise to an inference of discriminatory purpose."[226] Once the petitioner establishes a *prima facie* case, the burden shifts to the prosecution, the state's primary actor in the criminal justice system, to rebut that case.[227] Justice Blackmun's dissent opined, "[T]he State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties."[228] Apparently, however, the state's general denial of discriminatory intent in sentencing was enough for the majority.

According to Justice Powell, McCleskey's evidence satisfied the disparate impact standard in contexts such as jury venire and Title VII (Civil Rights) cases, but not in a death penalty context.[229] The *McCleskey* Court rejected disparate impact analysis in capital cases because, in Powell's view, such evidence threatened the discretion that is

225. *See* Baldus study, *supra* note 219. There are several studies that corroborate this claim. For example, Hans Zeisel analyzing Florida convictions between 1972 and 1977 found of 78 black defendants with white victims, 37 received the death penalty; of 190 white defendants with white victims, 46 received the death penalty; of 102 black defendants with black victims, 1 received the death penalty; of 8 white defendants with black victims, none received the death penalty. Moreover, 31% of convicted defendants with white victims reached death row, while only 1% of those with black victims did. Zeisel, *supra* note 114, at 459.

William Bowers studied convictions in Florida, Texas, and Ohio between 1974 and 1977. In Ohio, for instance, black defendants with white victims received the death penalty in 44 of 173 cases; white defendants with white victims received the death penalty in 37 of the 803 cases; black defendants with black victims received the death penalty in 20 of the 1170 cases; and white defendants with black victims received the death penalty in none of the 47 cases. They found the figures strongly suggested judgments of the crime's severity and a criminal's blameworthiness are greatly influenced by deep-seated racial prejudices. It appears juries regard the killing of a white by a black as a more serious crime than the killing of a black by a white, and blacks killing whites deserve more severe punishments than whites killing blacks. W. BOWERS ET AL., LEGAL HOMICIDE 222-66 (1984). Clearly, the statistics demonstrate that black defendants with white victims are substantially more likely to receive the death penalty than any other defendant-victim racial combination.

226. *McCleskey*, 481 U.S. at 351-52 (Blackmun, J., dissenting) (quoting Batson v. Kentucky, 476 U.S. 79, 94 (1986)).

227. *See* Batson v. Kentucky, 476 U.S. 79, 94 (1986). Also, in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), the Court wrote, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. Furthermore, in Washington v. Davis, 426 U.S. 229 (1976), the Court reasoned that "[i]t is also not infrequently true that the discriminatory impact—in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires—may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." *Id.* at 242.

228. *McCleskey*, 481 U.S. at 352 (Blackmun, J., dissenting) (quoting Batson v. Kentucky, 476 U.S. 79, 94 (1986)).

229. *Id.* at 280.

fundamental to the criminal justice system.[230] "McCleskey challenges decisions at the heart of the State's criminal justice system. . . . Implementation of these laws necessarily requires discretionary judgments. Because *discretion is essential to the criminal justice process*, we would demand exceptionally clear proof before we would infer that the discretion has been abused."[231] Thus, the majority held the Baldus study "is clearly insufficient to support an inference that any of the decision makers in McCleskey's case acted with discriminatory purpose."[232]

The majority foreclosed the possibility of shifting the burden of explaining discriminatory impact to the state, claiming in order to encourage discretion in the criminal justice system, neither prosecutors nor juries can be called upon to explain their actions or decisions.[233] McCleskey's use of the Baldus study could only prevail under the *Batson v. Kentucky*[234] standards of shifting the burden to the state.[235] Thus, by not allowing the burden to shift, the majority in effect established a standard of proof that was impossible to meet.[236]

Assuming the majority was correct in rendering it impossible for McCleskey to prevail under the Fourteenth Amendment, what about his Eighth Amendment claim? McCleskey alleged the discretion given a jury allowed room for racial prejudice, and that prejudice es-

230. According to Justice Powell, the Court has accepted statistics in jury venire and Title VII cases to demonstrate disparate impact which raises the possibility of discriminatory intent. However, Powell argued that McCleskey's case differs from the above contexts in the following ways: each death sentence determination is made by a properly constituted jury; juries are supposed to consider the characteristics and background of defendants along with the nature of the crime; there are fewer entities and variables than in Title VII cases and jury venire composition; and juries and prosecutors *cannot* be called to explain their behavior the way a jury foreman or employer could be. *McCleskey*, 481 U.S. at 293-96.

231. *Id.* at 297 (Powell, J.) (emphasis added). In *Lockett,* the Court stated although legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or the jury in noncapital cases; the state must allow for full individualization in capital cases. This was because death is qualitatively different from any other sentence. The court was satisfied that the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed. Lockett v. Ohio, 438 U.S. 586, 603-04 (1978) (Burger, C.J.).

232. *McCleskey*, 481 U.S. at 297 (Powell, J.).

233. *Id.* at 296.

234. 476 U.S. 79 (1986).

235. Under *Batson,* a *prima facie* case of discrimination is established by showing: 1) defendant is a member of a cognizable racial group; 2) the prosecutor has exercised peremptories to remove members of defendant's race; and 3) circumstances raise an inference that the prosecutor used this practice to exclude venire members because of their race. Once the defendant has established a *prima facie* case of discrimination, the burden shifts to the State to provide race neutral reasons for the challenged peremptory strikes. *Id.* at 96-98.

236. The Court imposed an impossible task on McCleskey in setting forth his burden of proving discriminatory intent on the part of the actors in his case. This would involve proving that jury members were prejudiced and that they discriminated against him. The Court, however, claimed the jury could not be called to testify as to their motives. Thus, the very task they set for McCleskey was forbidden by public policy and thus impossible to complete.

pecially affected black defendants accused of killing whites.[237] To support his claim, McCleskey relied solely on the Baldus study.

In its analysis of McCleskey's Eighth Amendment claim, the majority began by reaffirming the Court's decision in *Gregg*. The majority argued the infirmities of arbitrariness or discrimination in the imposition of the death penalty found in *Furman* were solved in *Gregg*.[238] Given *Gregg*-type safeguards, the majority argued since McCleskey's sentence was imposed under Georgia's sentencing procedures that focus discretion " 'on the particularized nature of the crime and the particularized characteristics of the individual defendant,' [the Court] lawfully may presume that McCleskey's death sentence was not 'wantonly and freakishly' imposed."[239]

Justice Brennan's dissent argued that where evidence indicated the odds of being sentenced to death were significantly greater than average if a defendant was black and the victim white, "the Court cannot rely on the statutory safeguards in discounting McCleskey's evidence, for it is the very effectiveness of those safeguards that such evidence calls into question. . . . '[W]e must critique [the safeguards'] performance in terms of results.' "[240]

After finding McCleskey's sentence was not wantonly or freakishly imposed, the majority stated, "[t]here is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. . . . The question 'is at what point that risk becomes constitutionally unaccept-

237. Indeed, McCleskey's claim that where there was discretion, there was also the potential for discrimination, was supported by several United States Supreme Court decisions. In Turner v. Murray, 476 U.S. 28 (1986), the Court overturned a death sentence because the trial judge did not allow the defendant to question prospective jurors concerning racial bias. Speaking through Justice Stevens, the Court said, "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Id.* at 35. Furthermore, in the same case, the Court noted, "[m]ore subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty." *Id.* at 35. In Rosales-Lopez v. United States, 451 U.S. 182 (1981), the Court wrote that "[i]t remains an unfortunate fact in our society that violent crimes perpetrated against members of other racial or ethnic groups often raise a [reasonable possibility that racial prejudice would influence the jury]." *Id.* at 192.

238. To support the claim that the remedies in *Gregg* solved the infirmities found in *Furman*, the Court reviewed the safeguards: a bifurcated trial system; jury discretion is limited by clear and objective standards so as to produce non-discriminatory application of the death penalty; automatic appeal of all death sentences to the Georgia State Supreme Court; threshold under which a defendant cannot receive the death penalty; the state cannot disallow mitigating factors; and a societal consensus that the death penalty is indeed constitutional for murder.

239. *McCleskey*, 481 U.S. at 308 (quoting *Gregg*, 428 U.S. at 206-07) (citations omitted).

240. *Id.* at 338 (Brennan, J. dissenting) (quoting Hubbard, *Reasonable Levels of Arbitrariness in Death Sentencing Patterns: A Tragic Perspective on Capital Punishment*, 18 U. C. DAVIS L. REV. 1113, 1162 (1985)).

able.' "[241] While the majority recognized jury actions were often inexplicable, the Court noted,

> The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that "buil[d] discretion, equity, and flexibility into a legal system."[242]

However, the Court historically asserted that because death is different, a capital sentencing system requires a *heightened* degree of reliability.[243] Nonetheless, in *McCleskey*, the majority retreated from this insistence on optimum reliability by acknowledging that no system is perfect and any mode for determining guilt or punishment has the weakness and potential for misuse.[244]

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241. *Id.* at 308-09 (quoting Turner v. Murray, 476 U.S. 28, 36 n.8 (1986)).

242. *Id.* at 311 (quoting H. KALVEN & H. ZEISEL, THE AMERICAN JURY 498 (1966)) (alteration in original). Professor Carter describes a phenomenon known as racialism, where people are predisposed to view things from certain perspectives, like racial stereotypes. Carter, *supra* note 112, at 430. This is distinct from racism, where one's prejudice is converted to actions. Racialism becomes racism based on what Carter calls *personal choice*. For example, if a juror thinks all blacks are criminals, and is especially offended by blacks who prey on whites, the juror may use *absolute* (strong) discretion allowed by *Stephens* to recommend a death sentence for a black defendant with a white victim. This juror's racialism became racism when he recommended the death penalty solely because the defendant was black and the victim was white. Carter says, "[t]he jury brings with it a range of preconceptions, and if racialist [stereotypes] are widespread in society, then racialist preconceptions would be among the factors shaping the 'discretion, equity, and flexibility' the *McCleskey* Court extolled." Carter, *supra* note 112, at 443.

Justice White acknowledged this phenomenon. "[A] juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether [a defendant's] crime involved . . . aggravating factors . . . . More subtle, less consciously held racial attitudes could also influence a juror's decision." Turner v. Murray, 476 U.S. 28, 35 (1986).

243. *See, e.g.,* Woodson v. North Carolina, 428 U.S. 280 (1976). *Woodson* stated because capital cases impose a punishment unique in kind and degree, imposition must reflect a heightened degree of reliability under the Eighth Amendment's proscription of cruel and unusual punishments. *Id.* at 305.

244. *McCleskey,* 481 U.S. at 312-13. In his opinion in Louisiana *ex rel* Francis v. Resweber, 329 U.S. 459 (1947) (holding Louisiana could presumably execute a prisoner twice because the electric chair failed to work properly the first time), Justice Reed wrote "[w]hen an accident, with no suggestion of malevolence, prevents the consummation of a sentence, the state's subsequent course in the administration of its criminal law is not affected on that account by any requirement of due process under the Fourteenth Amendment." *Id.* at 463. Fundamentally, Reed set up a negligence test. Since the electric chair failed as a result of an "accident," and not cruel motive on the part of Louisiana, the Due Process Clause of the Fourteenth Amendment was not violated. This same logic was used in *McCleskey* by Justice Powell who argued that accidents are a cost of having the death penalty. *McCleskey*, 481 U.S. at 312-13. Thus, if by heightened need for reliability, the Court meant the greatest possible pre-

> [T]here can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.'[245] Despite these imperfections, our consistent rule has been that constitutional guarantees are met when 'the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it *as fair as possible.*' . . . In light of the safeguards designed to *minimize racial bias* in the process, the fundamental value of a jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.[246]

Justice Brennan, in his *McCleskey* dissent, argued death was different because it was irrevocable—it defied the belief that the justice system rehabilitates, and denied the defendant the right to have rights. As such, the Court demanded a "uniquely high degree of rationality in imposing the death penalty. A capital sentencing system in which race more likely than not plays a role does not meet this standard."[247] Thus, for Brennan, an imperfect death penalty scheme did not comport with this uniquely high standard of rationality.

In addition to this demand for heightened rationality, Justice Brennan also argued the Baldus study must be examined in relation to history.[248] Brennan reasoned McCleskey's claim was consistent with an understanding of history and human experience relative to Georgia's

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caution against discrimination, the Court ignored this standard where death was concerned.

Significantly, Justice Powell abandoned this position several years later, too late to save Warren McCleskey from the electric chair. *See* David Von Drehle, *Powell Is Said to Favor Ending Executions*, WASH. POST, June 10, 1994, at A1.

245. *McCleskey*, 481 U.S. at 313 (quoting Zant v. Stephens, 462 U.S. 862, 884 (1983) (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978) (quoting Singer v. United States, 380 U.S. 24, 35 (1965)))).

246. *Id.* (emphasis added) (alteration in original). The dissenters in *McCleskey* argued that McCleskey's claim is concerned with the risk, not *proof* that the influence of race infected Georgia's death sentencing procedure. Even if proof was required, McCleskey provided such with the Baldus study. Statistics, they said, disclosed significant risk of discrimination, and concluded that although the Georgia scheme was fair on its face, it was being applied arbitrarily and had a discriminatory effect. *Id.* at 322, 324, 367.

247. *Id.* at 335 (Brennan, J., dissenting).

248. The history of racism and American law is manifest in the following joke about the law of homicide in Kentucky:

> If a black man kill a white man, that be first degree murder; if a white man kill a white man, that be second degree murder; if a black man kill a black man, that be manslaughter; but if a white man kill a black man, that be excusable homicide—unless a woman was involved, in which case the black man died of apoplexy.

Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 467 (1981).

Another example can be found in the use of capital punishment for rape convictions, which was found to be unconstitutional in Coker v. Georgia, 433 U.S. 584 (1977). Of the 455 people executed for rape, in the United States, 405 were black and all 455 had white victims. Hugo Bedau said,

race-conscious criminal justice system legacy, as well as the Court's own historical recognition of the persistent danger that racial attitudes affect criminal proceedings. In Justice Brennan's view, this history was enough to suggest McCleskey's claim was not just a "fanciful product of mere statistical artifice."[249] Brennan argued the Court had been, and should continue to be, concerned with the *risk* of discrimination in the imposition of the death penalty, not whether a defendant can prove *actual* discrimination.[250] Brennan opined, "[D]efendants challenging their death sentences thus never have had to prove that impermissible considerations have actually infected sentencing decisions. We have required instead that they establish that the system under which they were sentenced posed a significant risk of such an occurrence."[251] Brennan repeatedly argued when race and death are linked, as the Baldus study demonstrated, the Court should demand the highest scrutiny of the process of imposing the death penalty.[252] Justice Brennan's dissent is similar in tenor to the argument he advanced in *Harris*.

> [I]f the Court is going to fulfill its constitutional responsibilities, then it cannot sanction continued executions on the unexamined assumption that the death penalty is being administered in a rational, nonarbitrary, and noncapricious manner. Simply to assume that the procedural protections mandated by this Court's prior decisions eliminate the irrationality underlying application of the death penalty is to ignore the holding of *Furman* and whatever constitutional difficulties may be inherent in each State's death penalty system.[253]

> White men were rarely indicted and sentenced to death for rape of a black woman, whereas a black man convicted of raping a white woman was all but assured of a death sentence. . . . This is the most dramatic type of case in which we can see how the racist heritage of our society made the death penalty fall with disproportionate and unfair frequency on nonwhite offenders.

CAPITAL PUNISHMENT IN THE UNITED STATES, *supra* note 23, at 188.

249. 481 U.S. at 329 (Brennan, J., dissenting). The United States Supreme Court had invalidated the Georgia death penalty statute three times in the previous fifteen years. *Id.* at 330. The specter of race discrimination was acknowledged by the Court in striking down the Georgia death penalty in *Furman* and in *Coker*. *Id.* at 332. While race was not mentioned, the fact that by 1977, 58 of the 62 men executed for rape in Georgia were black influenced the Justices in their decision to abolish the death penalty for that crime. *Id.* In Godfrey v. Georgia, 446 U.S. 420 (1980), the Court struck down a death sentence because the wording of the statute was too vague. Justice Marshall's concurrence stated, "[t]he disgraceful distorting effects of racial discrimination and poverty continue to be painfully visible in the imposition of death sentences." *Id.* at 439.

250. *McCleskey*, 481 U.S. at 321-323.

251. *Id.* at 324 (Brennan, J., dissenting). Brennan noted the fact that since the *Gregg* decision, Georgia had executed seven people. All seven defendants had white victims and six of the seven defendants were black. These numbers are particularly striking given that in that same period the black defendant-white victim combination only constituted 9.2% of the cases and blacks were 60.7% of the homicide victims. *Id.* at 327.

252. *Id.* at 336-37.

253. Pulley v. Harris, 465 U.S. 37, 67 (1984) (Brennan, J., dissenting).

Consequently, if there is a risk that the death penalty is being imposed discriminatorily, no matter how remote, the penalty should be considered cruel and unusual punishment. As Justice Brennan stated, "[T]hat a decision to impose the death penalty could be influenced by *race* is thus a particularly repugnant prospect, and evidence that race may play even a modest role in levying a death sentence should be enough to characterize that sentence as 'cruel and unusual.' "[254]

At the heart of the *McCleskey* decision was the Court's desire to protect sentencing discretion and individualized justice. Conversely, at the heart of Justice Brennan's opinion was his desire to promote equality and consistency. The majority, however, erred in *McCleskey* in two ways. First, the majority erred when it stated the risk of discrimination must be constitutionally significant before it provides grounds to overturn a death sentence. Second, the majority's reliance on *Gregg*-type safeguards was flawed because those standards were eviscerated to the point where they were ineffective—as the Baldus study demonstrated. The Court's previous death penalty decisions supported this proposition.

For example, the *Furman* Court stated the death penalty "may not be imposed under sentencing procedures that create a *substantial risk* that the punishment will be inflicted in an arbitrary and capricious manner."[255] Consider also Justice O'Connor's opinion that a death sentence must be struck down when the circumstances under which it is imposed creates "an *unacceptable risk* that 'the death penalty [may have been] meted out arbitrarily or capriciously,' or through 'whim or mistake.' "[256]

In *Godfrey*, the Court struck down the petitioner's sentence because the vagueness of the statutory definition of heinous crimes created a *risk* that prejudice or other impermissible influences *might have* affected the sentencing decision. As Justice Brennan noted, "[I]n vacating the sentence, we did not ask whether it was likely that Godfrey's own sentence reflected the operation of irrational considerations. Nor did we demand a demonstration that such considerations had actually entered into other sentencing decisions involving heinous crimes."[257]

Prior to *McCleskey*, the Court used the risk of discrimination as the established standard for prevailing under the Eighth Amendment. Incredibly, after reiterating the risk standard in *McCleskey*, the majority claimed, despite the Baldus study, that McCleskey failed to meet this

254. *McClesekey,* 481 U.S. at 341.

255. Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (emphasis added) (citations omitted).

256. Caldwell v. Mississippi, 472 U.S. 320, 343 (1985) (O'Connor, J., concurring) (quoting California v. Ramos, 463 U.S. 992, 999 (1983) and Eddings v. Oklahoma, 455 U.S. 104, 118 (1982)) (alteration in original) (emphasis added).

257. *McCleskey*, 481 U.S. at 324 (Brennan, J., dissenting).

standard. Nowhere in previous cases was there such a high threshold for constitutionally significant levels of risk. Moreover, if McCleskey failed to meet this standard, *who can succeed*? The *McCleskey* majority apparently ruled as it did to protect the death penalty from claims based on statistical evidence. As Justice Brennan observed in *McCleskey*,

> [T]he Court's fear of the expansive ramifications of a holding for McCleskey in this case is unfounded because it fails to recognize the uniquely sophisticated nature of the Baldus study. McCleskey presents evidence that is far and away the most refined data ever assembled on any system of punishment, data not readily replicated through casual effort. Moreover, that evidence depicts not merely arguable tendencies, but striking correlations, all the more powerful because nonracial explanations have been eliminated. Acceptance of petitioner's evidence would therefore establish a remarkably stringent standard of statistical evidence unlikely to be satisfied with any frequency.
>
> The Court's projection of apocalyptic consequences for criminal sentencing is thus greatly exaggerated. The Court can indulge in such speculation only by ignoring its own jurisprudence demanding the highest scrutiny on issues of death and race. As a result, it fails to do justice to a claim in which both those elements are intertwined—an occasion calling for the most sensitive inquiry a court can conduct. Despite its acceptance of the validity of Warren McCleskey's evidence, the Court is willing to let his death sentence stand because it fears that we cannot successfully define a different standard for lesser punishments. This fear is baseless.[258]

It can be argued that it is generally dangerous, indeed in most cases undesirable, to apply aggregate statistics to specific cases.[259] However, the majority ignored the *death is different* argument previously recognized by the Court.[260] Death *is* different because it is the ultimate human sanction and is irrevocable. The Constitution's evolving standard of decency demands that a punishment comport with human dignity, as defined by Justice Brennan in *Furman*.[261] In order for a penalty to comport with human dignity, it must be imposed under the most reliable system possible. Consequently, if a petitioner demonstrates, through the use of statistics, that there is a risk the system under which his death sentence was imposed discriminates against

258. *Id.* at 341, 342.

259. For example, assume 99% of blacks in Harlem are criminals, and a black family moves from Harlem to Manhattan's Upper East Side, which is known to be an affluent neighborhood. The new neighbors cannot argue, based solely on aggregate statistics, that because the family is from Harlem, that they are criminals.

260. *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 357 (1977) (citing Gregg v. Georgia, 428 U.S. 153, 181-88 (1976)) (opinion of Stewart, Powell, and Stevens, JJ.); Furman v. Georgia, 408 U.S. 238, 286-91 (1972) (Brennan, J., concurring); 408 U.S. at 306-10 (Stewart, J., concurring); 408 U.S. at 314-71 (Marshall, J., concurring)).

261. *See Furman*, 408 U.S. at 273-74 (Brennan, J., concurring).

black defendants with white victims, and his case fits that pattern, his death sentence should be overturned.

Further, the *McCleskey* majority's reliance on *Gregg*-type safeguards failed to acknowledge that the Court had retreated from vigorously enforcing those safeguards. As previously noted, in *Lockett*, *Godfrey*, *Harris*, and *Zant*, the Court changed the very nature and function of those standards, yet persisted in referring to those standards as if they were the same as when first constitutionalized by the *Gregg* Court. For example, contrary to the *McCleskey* majority's assumptions, jury discretion in capital cases is not guided. In Georgia, other than establishing death eligibility, the finding of aggravating circumstances "does not play any role in guiding the sentencing body in the exercise of its discretion."[262]

Justice Stevens said, commenting on the *Zant* pyramid method of analyzing Georgia's death penalty scheme, "[T]here is an *absolute discretion* in the factfinder to place any given case below the [third plane] and not impose death."[263] Viewed conversely, this must mean after meeting statutory requirements a jury has *absolute* discretion to place a case at the top level and impose the death penalty. Justice Stevens said, "[T]he jury itself draws that final line, though it is guided in that it can only lift a defendant onto the final level if it is justified by the totality of the evidence."[264] Thus the defendant climbs to the fourth level by a process of *controlled absolute* discretion.[265]

This means the jury's next decision, the actual sentence, is not reviewed.[266] Justice Rehnquist opined in *Zant* that the chance improper instructions or guidance to the jury in the death eligibility stage alters

262. Burris, *supra* note 126, at 534 (quoting Justice Stevens in Zant v. Stephens, 462 U.S. 862, 874 (1983)).

263. Zant v. Stephens, 462 U.S. 862, 871 (1983).

264. Marc Riedel said:

> Under both mandatory and guided discretion statutes the jury is usually given the choice of convicting the defendant of a capital crime or some lesser offense. . . . [A] milder verdict reflecting the jury's sympathies in one case can quite as easily be a death sentence in another, reflecting the jury's lack of sympathy. These alternatives are discretionary decisions which are not effectively controlled.

Marc Riedel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-*Furman *and Post-*Furman, 49 TEMP L. Q. 261, 267 (1976).

Judge Clark, in McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985), wrote, "Race is a factor in the system only where there is room for discretion, that is, where the decision maker has a viable choice." *Id.* at 920 (Clark, J., dissenting in part and concurring in part).

265. Controlled absolute discretion is a phenomenon where the extent of the jury's control is to make the defendant death eligible or sentence the defendant to life in prison. How a jury arrives at this decision, and what happens to the defendant declared death eligible, is subject to absolute jury discretion.

266. The *Gregg* Court constitutionalized standards similar to Davis' confining, structuring, and checking. In *Harris*, the Court eroded the checking function by not requiring proportionality review. Now, by allowing the jury absolute discretion, the

the outcome at the sentencing stage is "all but nonexistent"[267] and largely beyond review.[268] If the jury sets the final level, then it exercises absolute discretion without control or guidance. This conclusion is contrary to the *Gregg* holding—that the standards are to provide a rational basis for distinguishing those who receive the death penalty from those who do not, rather than merely determining death eligibility.[269]

> The whole point was that the actual determination that a defendant should live or die had to be guided by clear and objective standards, not just the threshold decision of death eligibility.[270] *Furman* overturned statutes that gave the jury "practically untrammeled discretion to let an accused live or insist that he die."[271] The only difference between this pyramid scheme and the statutes we overturned then is that the unbridled discretion once present in all murder cases is not limited to those with one aggravating circumstance.[272]

Hence, it is fair to say procedures now in place make the jury less arbitrary than before *Furman* because those who are death eligible are not capriciously chosen. However, the standards do not, as the *McCleskey* majority would have us believe, govern choices within this sub-class as to who shall actually die. Charles Black says, "[T]he prac-

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Court has made any kind of review virtually impossible or, at the very least, impractical.

267. *Zant*, 462 U.S. at 900-01 (Rehnquist, J., concurring).

268. *Id.* at 901-04. Justice Rehnquist said of the sentencing of Stephens to death in *Zant*,

> The fact that [an erroneous] instruction gave added weight to this no doubt played some role in the deliberations of some jurors. Yet, the Georgia Supreme Court was plainly right in saying that the "mere fact that some of the aggravating circumstances presented were improperly designated 'statutory' " had "an inconsequential impact on the jury's decision regarding the death penalty." The plurality recognized in Lockett v. Ohio, 438 U.S. 586, 605, there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death." Whatever a defendant must show to set aside a death sentence, the present case involved only a remote possibility that the error had any effect on the jury's judgment; the Eighth Amendment did not therefore require that the defendant's sentence be vacated.

Id. at 904.

269. Hugo Bedau said,

> In 1976, we were told by the Court in *Gregg* that the death penalty as such was not in violation of the Constitution and that the new death penalty systems would in practice remedy the glaring defects of the old system. That promise has not been fulfilled . . . but [i]ts rulings suggest that it is content with actual practices in the state death penalty systems that are increasingly indistinguishable from those that prevailed prior to *Furman.*

Bedau, *supra* note 131, at 15.

270. Burris, *supra* note 126, at 535 (citing *Zant*, 462 U.S. at 907).

271. *Id.* (quoting *Zant*, 462 U.S. at 911 (quoting *Furman*, 408 U.S. at 248 (Douglas, J., concurring) (footnote omitted))).

272. *Id.* (citing *Zant*, 462 U.S. at 911).

tical position remains unchanged; the Georgia jury, without real restraint and without real standards, chooses life or death. . . . The new statutes *do not effectively restrict* the discretion of juries by any real standards."[273] Under *Furman*, if there were no standards that actually worked to prevent discriminatory imposition of the death penalty, the death penalty should be abolished because unfettered jury discretion gives rise to the possibility of arbitrary or discriminatory imposition.[274]

As stated, the *McCleskey* decision rejects this logic in favor of a flawed system simply because no system is perfect. The *McCleskey* majority correctly recognized no system is perfect. In non-capital cases, it is clear that while discrimination may exist, the Court has done the *very best it can* to minimize discrimination. The cost to society of eliminating the criminal justice system is much greater than the cost of having a system in which discrimination may occur. The *McCleskey* majority made this same argument with respect to the death penalty. This argument failed, however, because given the erosion of the standards, it is difficult to imagine how the majority could claim they have done the *very best they could* to prevent discrimination from entering into death penalty decisions. Rather than take measures that might mitigate discrimination, the *McCleskey* majority merely dismissed existing discrimination as a necessary cost of the death penalty.[275]

Under *McCleskey*, juries have unfettered discretion. Consequently, a jury can sentence blacks to death solely because the defendant is black and the victim white. This is the very flaw in capital punishment application condemned in *Furman*. What was unconstitutional under *Furman* was characterized in *McCleskey* as acceptable, if not desirable, discretion. The discretion the Court accepted as a hallmark of individualized justice undermined the purpose for which discretion existed. Thus, in an environment where racial discrimination was historically prevalent, what was unexplained could very well be invidious,

273. BLACK, *supra* note 131, at 76.

274. Justice Brennan, in his *McGautha* dissent, argued jury discretion may be appropriate in death sentences:

> But discretion, to be worthy of the name, is not unchanneled judgment; it is judgment guided by reason and kept within bounds. Otherwise, in Lord Candem's words, it is 'the law of tyrants: It is always unknown: It is different in different men: It is casual, and depends upon constitution, temper, passion.—In the best it is often times caprice: In the worst it is every vice, folly, and passion, to which human nature is liable.'

McGautha v. California, 402 U.S. 183, 285 (1971) (Brennan, J., dissenting).

275. It can also be argued that the death penalty, unlike the criminal justice system, is not necessary. Therefore, the cost to society of having a death penalty with its potential for discrimination is greater than the cost to society of not having the death penalty at all. The cost can be measured in terms of retribution and deterrence; the death penalty has not been proven to be of any more retributory or deterrent value than life imprisonment. Thus, society has more to lose by allowing a state to impose the death penalty (under a system that gives rise to discriminatory influences), than by not having the penalty at all.

especially in light of the Baldus study. By attempting to strike a balance in capital sentencing between racially neutral standards and individualized justice, the Court effectively validated discrimination by emphasizing the latter at the expense of equality.

In the absence of a workable balance between equality and individualization, the death penalty, for the reasons stated in *Furman,* should once again be abolished.[276] Charles Black, quoting the law of Moses, writes,

> The Law of Moses is full of the death penalty. But as time went on the court in ancient Jerusalem, without of course touching one syllable of this Law, devised *procedural* safeguards so refined, so difficult of satisfying, that the penalty of death could only very rarely be exacted.[277]
>
> . . . .
>
> I think the rabbis, in surrounding the punishment of death with nearly unsatisfiable *procedural* safeguards, were groping (or perhaps consciously moving) toward a truth . . . I think they were saying at last, "Though the justice of God may indeed ordain that some should die, the justice of man is altogether and always insufficient for saying who these may be."[278]

CONCLUSION

The State of Georgia executed Warren McCleskey on September 25, 1991. As Justice Brennan poignantly stated in his *McCleskey* dissent,

> At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of kill-

276. It is important to note that this author is not suggesting the Court do anything further. In *McCleskey*, the Court faced virtually the same situation as in *Furman*. Thus, the Court should have rendered the same decision in *McCleskey* as in *Furman*. Moreover, the Court in *Furman* rendered its decision in the absence of any empirical evidence. In *McCleskey,* the Justices were presented with the most comprehensive study ever conducted on the death penalty—a study which largely confirmed the Court's findings in *Furman*. Therefore, it was not unreasonable or illogical to have expected the Court to have ruled in *McCleskey*, as it did in *Furman*, that the death penalty was unconstitutional.

277. BLACK, *supra* note 131, at 106.

278. *Id.* at 106-07.

> ing a white person would not have received the death penalty if their victims had been black, while, among defendants with aggravating and mitigating factors comparable to McCleskey's, 20 of every 34 would not have been sentenced to die if their victims had been black. Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.[279]

This is the story of Warren McCleskey and those similarly situated told in the context of race and the death penalty. By holding Georgia acted constitutionally when sentencing McCleskey to die, the Court firmly and finally tipped the scales in favor of individualized justice and sentencing discretion over equality and racial neutrality. In so doing, the Court brought its death penalty jurisprudence full circle. In *Furman,* the Court invalidated the death penalty because unguided jury discretion created individualized justice at an unacceptable price—equality and racial neutrality. The *Gregg* Court rejected mandatory death sentences in favor of statutes providing for guided discretion. The *Gregg* Court noted mandatory death sentences produced equality, but at the expense of individualization, whereas, according to the Court, guided discretion struck a balance between those two extremes. After *Gregg*, however, the Court compromised those standards. By the time McCleskey presented the Baldus study, it was clear that guided discretion did not work. Nonetheless, rather than admit guided discretion was unworkable, the Court adopted the imperfect system argument. In effect, the Court decided discretion and individualized justice were so important to the system that they would take precedence over even equality and racial neutrality.

This author does not criticize the Court for seeking to resolve the tension between individualized justice and equality. This author criticizes the Court for choosing to resolve the tension in a way that ignored the significant risk of discrimination the State of Georgia and other jurisdictions created when they executed defendants like Warren McCleskey without carefully weighing aggravating and mitigating circumstances and, moreover, because the Court failed to impose every precaution it could to ensure the defendant was not executed because he was black and his victim white—and that is aggravating enough.

279. McClesky v. Kemp, 481 U.S. 279, 321 (1987) (Brennan, J., dissenting) (citations omitted).