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Article 4

12-1-1978

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Karl M. Manheim, *The Capital Punishment Cases: A Criticism of Judicial Method*, 12 Loy. L.A. L. Rev. 85 (1978).

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THE CAPITAL PUNISHMENT CASES: A CRITICISM OF JUDICIAL METHOD

by *Karl M. Manheim**

I. INTRODUCTION

The eighth amendment¹ prohibits the infliction of cruel and unusual punishments. In a society where criminal laws and processes have been highly visible aspects of social development, one would have expected early and periodic pronouncements on the reach of this proscription. Yet, eighth amendment jurisprudence has not, until recently, been very extensive. The lack of reference to the eighth amendment in constitutional litigation has been most surprising in the area of capital punishment. This problem has not resulted from neglect, but from the fact that capital punishment has historically been assumed to be necessary and appropriate in dealing with serious offenses. Except for scattered cases involving unconscionable or unique sentences, the eighth amendment has emerged only from desuetude during this decade.

The Supreme Court has traditionally approached the issue of capital punishment with reluctance and caution. Recent death penalty adjudications have been further marked by unusual differences in methodology among the Justices. Efforts at deriving a unitary principle concerning the constitutional status of capital punishment have resulted in uncertainty in this area. In fact, some have seen the most recent capital cases as contradictory to the requirements which had previously evolved.² A majority of the Court has declined to prohibit capital punishment as a sanction per se inconsistent with the eighth amendment. Instead, death penalties may be constitutionally meted out in cases involving homicide. Furthermore, sentencing procedures must fall somewhere between vesting the sentencing body with standardless discretion and removing all such discretion through the use of automatic sentencing. Other instances in which the death penalty may be imposed will likely appear on a case by case basis.

This article explores the development of judicial method in capital

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1. U.S. CONST. amend. VIII.

2. See note 245 *infra* and accompanying text.

cases since 1971. Its structure consists of a chronological discussion of the leading cases. It is critical of the Court's continuing reticence to develop coherent standards and what appears to be the absence of enduring principles. In the capital cases, most of the justices have adhered to a theory of judicial review which relies heavily on legislative judgment and popular sentiment. The Court should instead take a more expansive role in interpreting the meaning of "cruel and unusual," to the point of exercising moral leadership in this controversial area.

II. THE CONSTITUTIONALITY OF THE DEATH PENALTY PER SE: *FURMAN V. GEORGIA*

The death penalty is not proscribed explicitly in the Constitution. Indeed, it is implicitly condoned in several passages.³ As a result, challenges to the constitutionality of capital punishment must be based upon the fifth and fourteenth amendment⁴ guarantees of due process or upon the ambiguous wording of the eighth amendment guarantee against cruel and unusual punishment. Prior to *Furman v. Georgia*,⁵ the constitutionality of the death penalty per se was never addressed in a United States Supreme Court decision. Instead, most attacks on particular death sentences were directed at the convictions themselves or at the sentencing procedures. In those few challenges which raised the validity of a death sentence, it was the mode of execution, rather than the fact of execution, which was considered. For example, in *In re Kemmler*,⁶ the Supreme Court rejected a substantive due process challenge to electrocution as an inhumane method of executing a death sentence.⁷

In *Furman*,⁸ five of the nine separate opinions found the death penalty, as applied to Furman, unconstitutional.⁹ Justices Brennan and Marshall each dealt with the facial constitutionality of capital punishment directly, finding it violative of the eighth amendment. However,

3. *E.g.*, U.S. CONST. amend. V: "No person shall be held to answer for a capital . . . crime, unless on presentment or indictment of a Grand Jury"

4. U.S. CONST. amend. XIV.

5. 408 U.S. 238 (1972) (per curiam).

6. 136 U.S. 436 (1890) (death by electrocution not "cruel and unusual").

7. *Id.* at 447. *Accord*, *Francis v. Resweber*, 329 U.S. 459 (1946) (failure to electrocute prisoner on first attempt would constitute "cruel and unusual" punishment only if intentional). *See also* *Wilkerson v. Utah*, 99 U.S. 130 (1879) (death sentence by hanging or firing squad not erroneous).

8. 408 U.S. 238 (1972) (per curiam).

9. *See, e.g.*, Justice Blackmun's dissent in *Furman v. Georgia*, 408 U.S. at 405.

opinions by Justices Stewart, White, and Douglas all pursued an analytic approach and found that procedural due process safeguards were deficient in the sentencing schemes under review. Thus, two basic approaches toward eighth amendment interpretation emerged from *Furman*: the analytic approach and the normative approach.

A. The Analytic Approach

The methodology pursued by Justices Stewart, White, and Douglas in *Furman* has been labeled as the analytic approach.¹⁰ It has the eighth amendment derive principle meaning from other explicit constitutional guarantees such as due process and equal protection. Accordingly, the eighth amendment would require that personal guarantees found elsewhere in the text of the Constitution be applied with particular exactitude when severe punishments are involved. In this vein, Justices White and Stewart found the *Furman* capital statutes to be arbitrary and capricious in their application.¹¹ Justice Douglas further found that the statutes permitted discriminatory application in violation of the equal protection clause.¹²

Where used in the capital punishment cases, the analytic approach

10. Polsby, *The Death of Capital Punishment? Furman v. Georgia*, 1972 SUP. CT. REV. 1, 10 [hereinafter cited as Polsby]. See also Sarat & Vidmar, *Public Opinion, The Death Penalty and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171, 172 [hereinafter cited as Sarat & Vidmar].

11. 408 U.S. at 308-11.

12. *Id.* at 249. However, capital sentencing which violates equal protection either can be theoretically rectified without resort to the eighth amendment or is endemic to the criminal process. In the first case, fourteenth amendment guarantees of equal protection could be invoked to prevent discrimination in sentencing. *Accord*, Maxwell v. Bishop, 398 F.2d 138, 148 (8th Cir. 1968), *rev'd on other grounds*, 398 U.S. 262 (1970). In *Maxwell*, the Court recognized that discretion exists at all stages of a criminal prosecution. To fully remove such discretion might unreasonably impede the criminal justice system. Gregg v. Georgia, 428 U.S. 153, 199-204 (1976).

A study to be published shortly by Professor William Bowers of Northeastern University concludes that the death penalty continues to be meted out in a rare, arbitrary, and discriminatory manner.

In cases of murder or felonious homicide, the Bowers study reveals that the killer of a white man is six times more likely to be sentenced to death than the killer of a black man. The study further shows that a black who kills a white is 50 times more likely to receive a death sentence than a white who kills a black.

NORTHEASTERN TODAY, June 1978, at 1.

See also Lehtinen, *The Value of Life: An Argument for the Death Penalty*, 23 CRIME & DELINQUENCY 237 (1977) [hereinafter cited as Lehtinen], which suggests that procedural safeguards, not eighth amendment prohibitions, would correct discriminatory executions. However, Lehtinen cautions: "A system designed to apply the death penalty nondiscriminatorily would probably execute a far greater number of [men, blacks, ignorant, and poor], simply because the crimes that call for execution are most frequently committed by them." *Id.* at 247.

does not appear well defined. In the area of criminal punishment, analysis under the due process clauses will often overlap eighth amendment analysis. The Supreme Court has done little to distinguish reasoning under one from reasoning under the other. In fact, in *Furman*, Justice Powell commented: "Whether one views the question as one of due process or cruel and unusual punishment, as I do for convenience in this case, the issue is essentially the same."¹³

However, the issues raised by the eighth amendment and the due process clause are not the same, and loose analysis of these guarantees has caused the Court some trouble. In *Robinson v. California*,¹⁴ for the first time, the Court extended the eighth amendment's applicability directly to the states, thereby limiting state determinations of criminality. At the very least, this incorporation suggests that the eighth amendment offers protections not immediately found within fourteenth amendment notions of due process. The interplay between due process and eighth amendment analysis leaves any principled approach in this area confusing at best. In *McGautha v. California*,¹⁵ the Court held that neither strict sentencing standards nor bifurcated trials in capital cases were required by the due process clause. A year later, however, *Furman* implicitly overruled *McGautha*. *Furman* and *McGautha* were later distinguished on the ground that *Furman* was an eighth amendment decision whereas *McGautha* relied solely on the due process clause.¹⁶

The confusing interplay between these constitutional protections is also found in the Massachusetts Supreme Judicial Court's capital judgment case, *Commonwealth v. O'Neal*.¹⁷ In the leading opinion, Chief Justice Tauro relied on both the due process and cruel and unusual punishment clauses of the Massachusetts Declaration of Rights: "This dual analysis is possible here where these two concepts are 'so close as to merge' because the 'due process argument reiterates what is essentially the primary purpose of the Cruel and Unusual Punishments Clause. . . .'"¹⁸ Yet, two pages later Chief Justice Tauro stated that a decision based on due process would have no bearing on the constitu-

13. 408 U.S. at 429 (Powell, J., dissenting).

14. 370 U.S. 660 (1962) (holding a statute which made the status of narcotic addiction a criminal offense imposed "cruel and unusual" punishment).

In *Francis v. Resweber*, 329 U.S. 459 (1942), Justice Frankfurter's concurring opinion found that the concept of ordered liberty in the due process clause itself "expresses a demand for civilized standards" in punishment. *Id.* at 468 (Frankfurter, J., concurring).

15. 402 U.S. 183 (1971).

16. *Gregg v. Georgia*, 428 U.S. 153, 195-96 n.47 (1976).

17. 339 N.E.2d 676 (Mass. 1975).

18. *Id.* at 677.

tionality of capital punishment under the cruel and unusual test.¹⁹

In response to *Furman v. Georgia*, and the procedural defects which highlighted the analytic approach, state legislatures developed tighter and procedurally more acceptable sentencing schemes. In 1976, in *Gregg v. Georgia*,²⁰ the Court was again presented with a per se challenge to the constitutionality of capital punishment. This time, a majority of the Court found the procedural guarantees which were lacking in *Furman*²¹ to be properly safeguarded and, accordingly, let Georgia's capital statute stand.

In a 1977 case, *Gardner v. Florida*,²² the Supreme Court invalidated a death sentence where the trial judge relied, in part, on a confidential presentence report which had not been revealed to the defense. Justice Stevens' opinion for the Court relied exclusively on the due process clause of the fourteenth amendment, although Justice White, concurring, would have employed a narrower eighth amendment analysis to find the sentence unconstitutional. Justice White's analytic approach would require the sentencing judge to reveal such reports only where a sentence of death was possible. Consequently, the eighth amendment is essential to the analytic method only in that independent constitutional guarantees, such as due process, apply with greater force in capital cases.²³

Eighth amendment analysis as due process analysis does find scholarly support. An article by Professor Angel²⁴ suggests that substantive due process has reemerged in criminal law. But Professor Angel's thrust is that the judicial methodology is that of substantive due process

19. Chief Justice Tauro's due process analysis is rather short, finding that insofar as "life is a fundamental right explicitly or implicitly guaranteed by the Constitution," the state must show a compelling governmental need to extinguish it; which it fails to do. But while endeavoring to "clarify the relationship between these two lines of analysis," the opinion does not do so. *Id.* at 679.

20. 428 U.S. 153 (1976).

21. See, e.g., Justice Blackmun's dissent in *Furman v. Georgia*, 408 U.S. at 405.

22. 430 U.S. 349 (1977).

23. A procedure for selecting people for the death penalty which permits consideration of such secret information relevant to the "character and record of the individual offender," . . . fails to meet the "need for reliability in the determination that death is the appropriate punishment" which the Court indicated was required in *Woodson* [*v. North Carolina*, 428 U.S. 280 (1976)]. This conclusion stems solely from the Eighth Amendment's ban on cruel and unusual punishments on which the *Woodson* decision expressly rested, and my conclusion is limited, as was *Woodson*, to cases in which the death penalty is imposed.

Gardner v. Florida, 430 U.S. at 364 (White, J., concurring) (quoting *Woodson v. North Carolina*, 428 U.S. at 304, 305).

24. Angel, *Substantive Due Process and the Criminal Law*, 9 LOY. CHI. L.J. 61, 74 (1977) [hereinafter cited as Angel].

and not necessarily that the eighth amendment has no vitality of its own. Nonetheless, she explains the recent capital punishment cases using the "means-ends" analysis of substantive due process.²⁵

Despite the fact that the analytic approach gained prominence in *Furman* and has been used intermittently since then, it is clear that procedural due process is insufficient to insure that the eighth amendment proscriptions on inhumane punishments will be observed.

The very fact that the eighth amendment proscription of cruel and unusual punishment is in the Constitution ought to condemn reliance on due process alone. If an individual were afforded every procedural consideration, duly convicted of a crime and then burned at the stake, we would agree that his rights had not been "sufficiently" protected.²⁶

Accordingly, it appears that an analytic approach to the eighth amendment denies the independent protection of that amendment. This approach falls short in several key places and impedes the development of standards for punishments.

B. *The Normative Approach*

The normative approach recognizes the eighth amendment as an independent proscription of inhumane punishments. It finds its meaning "not in other provisions of the Constitution but in the fundamental values which underlie the Constitution as a whole."²⁷ Polsby labeled this the normative approach because those who employ it seek to formulate standards which originate from outside the written law.²⁸

Normative eighth amendment analysis first appeared in *Weems v. United States*.²⁹ There the Court refused to accept an interpretation of the eighth amendment which would invalidate only those punishments rejected at the time the amendment was adopted. Instead, the meaning of "cruel and unusual" was tied to the maturing ethical values of society: "The clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlight-

25. Professor Angel states that the *Gardner* Court's reference to *Furman* as "due process" authority is a retreat from eighth amendment language in favor of "substantive due process" reasoning. See also *Furman v. Georgia*, 408 U.S. at 359 (Marshall, J., concurring).

26. Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1802 (1970) [hereinafter cited as Goldberg & Dershowitz].

27. Sarat & Vidmar, *supra* note 10, at 173.

28. Polsby, *supra* note 10. See also Sarat & Vidmar, *supra* note 10, at 174.

29. 217 U.S. 349 (1910).

ened by a humane justice."³⁰

In *Trop v. Dulles*,³¹ the Court reiterated this proposition: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."³²

The normative approach is basically an effort to develop a set of independent standards which aid in the fluid interpretation of "cruel and unusual." Those words are probably more than a "collection point for other, established constitutional theories."³³ Additionally, it is doubtful that they prohibit only those punishments in disfavor at the time the Bill of Rights was adopted.³⁴

The proposition of a static eighth amendment no longer seems tenable, particularly in light of the development of normative analysis since *Weems*.³⁵ Cases following *Furman* have generally applied analyses derived from a normative approach. Standards peculiar to the eighth amendment have been used primarily to reject the imposition of the death penalty for rape.³⁶ The normative approach was also used to conclude that the eighth amendment does not prohibit capital punishment in all circumstances.

30. *Id.* at 378. The Court spoke also of the evolutionary character of the Constitution in general:

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth.

Id. at 373.

31. 356 U.S. 86 (1958).

32. *Id.* at 101.

33. Polsby, *supra* note 10, at 10.

34. However, Chief Justice Burger does suggest this historical interpretation in *Furman*: "The records . . . show that the framers' exclusive concern was the absence of any ban on tortures . . ." 408 U.S. at 376-77. Professor Malcolm Wheeler refutes this interpretation:

The framers must have intended that the eighth amendment would be applicable to new punishments never considered during the eighteenth century. It follows that there must be principles by which we can determine whether any new punishment violates the eighth amendment. The logical way to derive such tests is to ask what principles led the framers to be concerned with certain methods of torture . . . It seems rather clear that the reason for adopting specific historical language is to adopt the results or principles which underlie it.

Wheeler, *Toward a Theory of Limited Punishment II; The Eighth Amendment After Furman v. Georgia*, 25 STAN. L. REV. 62, 63-64 n.7 (1972) [hereinafter cited as Wheeler - II]. See also Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960): "[It is not the case that] our ultimate constitutional freedoms are no more than our English ancestors had when they came to this new land to get new freedoms." *Id.* at 867.

35. However, Justice Rehnquist may not be ready to abandon this theory. See *Woodson v. North Carolina*, 428 U.S. 280, 308 (1976). (Rehnquist, J., dissenting).

36. *Coker v. Georgia*, 433 U.S. 584 (1977).

But the analytic approach has not disappeared. It was specifically invoked in the mandatory cases³⁷ and recently in *Lockett v. Ohio*³⁸ where Justice Blackmun, concurring, found fifth and sixth amendment infirmities in petitioner's death sentence. These occasional applications of the analytic method, however, are generally supplemental to the broader normative approach. Accordingly, the Court has settled on an interpretation of the eighth amendment which reflects the *Weems* and *Trop* analysis: that "cruel and unusual" derives its meaning from the "evolving standards of decency." Just how those standards are divined is still the major issue in eighth amendment adjudication.

III. ESTABLISHING STANDARDS FOR "CRUEL AND UNUSUAL"

The majority in *Gregg v. Georgia*³⁹ chose to seek external and "objective" evidence of the evolving standards of decency upon which to base constitutional principles. These factors include historic usage, legislation, public opinion, and jury conduct. By using such external factors, these Justices rejected a reliance on personal moral feelings in establishing norms for humane punishment.

Previously, in *Furman*, at least five Justices had found the penalty to be repugnant to their personal moral beliefs. Yet, three of the five, Justices Blackmun, Powell, and Burger, had refrained from "judicial activism" by adhering to conventional presumptions of legislative validity. This highly deferential approach prevailed in *Gregg*. These Justices perceived a problem no less significant than that of institutional legitimacy; to link "non-democratic" judicial review to public consent in some way.⁴⁰ Professor Tribe, in his treatise on constitutional law, states: "This point of view, then, seeks to reduce the role of judges in the process of constitutional review by holding judges to a method of reasoning which as much as possible moves from constitutional text to the result in the case at hand without intervening value judgments."⁴¹ In the death penalty cases, this jurisprudence predominates. For in-

37. See notes 211-82 *infra* and accompanying text.

38. 98 S. Ct. 2954 (1978).

39. 428 U.S. 153 (1976).

40. See Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976) [hereinafter cited as Perry],

The legitimacy of the power of judicial review is essentially an antiquarian issue [It is] however, not altogether without contemporary significance. The degree of ease with which one justifies judicial review — especially in functional terms, as an aspect of the political theory of American democracy — can affect one's stand on the fundamental issue of American constitutional law: the proper scope of judicial review.

Id. at 707-08.

41. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 48 (1978) [hereinafter cited as L. TRIBE].

stance, in *Furman*, Chief Justice Burger stated that "constitutional inquiry . . . must be divorced from personal feelings as to the morality and efficacy of the death penalty."⁴²

Of course, reference to objective evidence of public values is not new with the death penalty cases. Former Justice Goldberg and Professor Dershowitz recalled that the due process analyses of Justices Cardozo and Frankfurter similarly eschewed subjective value judgments. "Rather, they interpreted the [due process] clause to protect only those values which were in fact generally accepted and adhered to. As an index of constitutional protection, the Court tended to rely upon objective idicia of attitudes actually prevailing in society."⁴³ Also permeating our history of substantive due process is first a denial of and then a retreat from subjective principles in constitutional law. Avoiding "subjectivism" is suggested by some to be the major task of the Court in all cases.⁴⁴ Images of the *Lochner* era are conjured up whenever the Supreme Court seems to grope for a natural rights solution to a non-textually based constitutional issue. Today there is an obvious avoidance of the economic due process methodology of the late 19th and early 20th centuries. This is apparent in many of the penumbra cases, such as those which recognize fundamental rights of privacy and family relations.⁴⁵

42. 408 U.S. at 375.

43. Goldberg & Dershowitz, *supra* note 26, at 1799. See also *Repouille v. United States*, 165 F.2d 152 (2d Cir. 1947). In *Repouille*, Judge Learned Hand, in considering the Nationality Act of 1940, 8 U.S.C. § 707(a)(3), determined that the phrase "good moral character" . . . set as a test, not those standards which we might ourselves approve, but whether 'the moral feelings, now prevalent generally in this country' would 'be outraged' by the conduct in question: that is, whether it conformed to 'the generally accepted moral conventions current at the time.'" *Id.* at 153. But see note 87 *infra* and text accompanying.

44. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

45. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), Justice Douglas expanded the reasoning behind *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), while at the same time avoiding the charge that the Court was "fashioning constitutional law out of the Justices' personal preferences." Wellington, *Notes on Adjudication*, 83 YALE L.J. 221, 287 (1973). Justice Douglas had also applied an analytic approach in *Griswold* by denying any meaning to "due process" independent of other constitutional provisions.

Just as *Meyer* and *Pierce* had established "first principles" of constitutional law, so, to some extent, had cases such as *Griswold* and *Roe v. Wade*, 410 U.S. 113 (1973), thereby firmly establishing the "right of privacy" as a fundamental constitutional guarantee. Professor Perry has suggested that the Court should engage in ethical leadership. He also states that morally based cases may rest upon previous cases which established "first principles" of conventional morality. He cites *Griswold* and *Roe* as taking this approach. Perry, *supra* note 40, at 730. However, not all cases requiring non-textual adjudication can rest upon previous "first principles." Some of these cases must establish those principles, as did *Meyer*

A discomfort with subjectivism appears in many of the death penalty opinions.⁴⁶ There is an obvious tension between the desire to find neutral principles underlying the eighth amendment and the Court's constitutional task to render judgments on the validity of penalty legislation.⁴⁷ The alliance between normative values and public morality, beginning with *Weems*⁴⁸ and *Trop*⁴⁹ and continuing to the present, has been an effort to resolve this conflict. This view employs the eighth amendment as authority for the Supreme Court to engage in a comprehensive analysis of societal attitudes on criminality and punishments.⁵⁰ Personal beliefs of the Justices are useful at the extremes but otherwise should not be considered unless consistent with broad based social values.

The current version of the normative approach, which relies on popular values, does not fully implement eighth amendment protections and cannot be applied faithfully in all cases.⁵¹ Moreover, before analyzing how the Justices in fact objectively determine popular values, it is useful to ask how a particular Justice will know when his views diverge from the public's views. Deference to legislative judgment⁵² is not the only question. That is a relatively easy analytic task. Usually the Justices' personal moral beliefs will not be so different from the public's as to enable clear differentiation. And to what extent do the Justices themselves comprise a part of the relevant public such that their own beliefs are indicative of general attitudes?

Professor Perry⁵³ suggests that even in the substantive due process cases the Justices merely reflect conventional morality:

It bears special emphasis that each Justice is but part of the Court-as-jury.

and *Pierce*. The competency and legitimacy of the Court to establish those principles in the first instance is in need of resolution. See notes 64-66 *infra* and accompanying text.

46. See, e.g., *Furman v. Georgia*, 408 U.S. at 411 (Blackmun, J., dissenting) ("We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these.").

47. The Supreme Court has never denied its ultimate responsibility to render judgment on the constitutionality of the death penalty. See *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

48. 217 U.S. 349 (1910).

49. 356 U.S. 86 (1958).

50. See section IV *infra*.

51. See notes 224-27 *infra* and accompanying text. See also Tao, *Beyond Furman v. Georgia: The Need for a Morally Based Decision on Capital Punishment*, 51 NOTRE DAME LAW. 722, 736:

[R]eference to the "democratic process" does not contribute to a decisive solution. Legislators, in any case, are ill-equipped to announce and elaborate on first moral principles. Accordingly, the Supreme Court not only seems most fit to solve the problem on moral grounds in the context of the Constitution, but will find it difficult again to evade the issue of the intrinsic value of capital punishment.

52. See section IV(B) *infra*.

53. Perry, *supra* note 40.

Even if, in mapping the contours of the public morals, one or more members of the Court are seriously out of touch with conventional moral culture - or one or more members practice studied disingenuity in assaying that culture - it is unlikely that a majority of the Court will be similarly out of touch or disingenuous. In this quite crucial sense, the contribution of each Justice to the collective evaluation of conventional moral culture is subject to a significant corrective check.⁵⁴

As noted above,⁵⁵ at least five of the Justices in *Furman*⁵⁶ stated that the current capital statutes were repugnant to their personal beliefs. Is it possible that they are so out of touch with community standards as to discount their own judgments?⁵⁷

The judicial process is not divorced completely from the political process, and appointed Justices are normally representative of the relevant public.⁵⁸ "The Justices, after all, are not unfamiliar with conventional mores and attitudes; in truth it is unlikely that a very unconventional person would become a Justice of the Supreme Court."⁵⁹ Professor Tribe also questions conceptions of the Supreme Court as aloof and indifferent to contemporary political issues. "The process of appointment, however, is entirely political, and the sometimes quite rapid turnover in the Supreme Court's membership suggests that the federal judiciary may be more capable of adapting to changes in the political consensus than the notion of an independent judiciary would immediately suggest."⁶⁰

Yet, the Justices are in a position removed from the political pressures of the legislative process and perhaps are more able to keep attuned to the public morals. Even if the moral issues before the Court did not require an anti-majoritarian institutional framework, such as that suited for adjudication of political and civil rights issues, the political responsiveness of legislatures may render them "too close to the action" to accurately assess general cultural attitudes. The Supreme Court may be insulated from political pressures, but it is not isolated

54. *Id.* at 732 n.201.

55. See notes 39-42 *supra* and accompanying text.

56. 408 U.S. 238 (1972) (per curiam).

57. See also Greenwalt, *Discretion and Judicial Decision*, 75 COLUM. L. REV. 359, 398 (1975): "[I]t can be argued that on many issues a judge might assume that if his values are far wide of community standards, he will be outvoted by his brethren or reversed by a higher court."

58. Perhaps this is not the case of the public at large, but it is at least representative of that portion which has political influence. See Perry, *supra* note 40, at 717.

59. *Id.* at 730.

60. L. TRIBE, *supra* note 41, at 49-50.

from the ethical norms of contemporary culture.⁶¹ "The Court . . . sensitized by constitutional decision making and insulated from the obscuring political pressures and expedencies of the moment, is admirably situated to observe and to sense the evolution of contemporary moral culture."⁶²

Not only are the courts well equipped to engage in the moral debate, the constitution forces that task upon them. The eighth amendment itself might be said to provide authority for the Court to independently develop normative values regarding "cruel and unusual."

Much of our substantive constitutional doctrine is of this kind. Where it arises "under" some piece of constitutional text, the text is not invoked as the source of the values or principles that rule the cases. Rather the broad textual provisions are seen as sources of legitimacy for judicial development and explication of basic shared national values.⁶³

Thus, certain constitutional provisions, themselves absent of explicit or normative values, can be seen as authority for the development of such values. The public welfare limit on the police power may support this particular judicial method.⁶⁴ The ninth amendment⁶⁵ might also provide authority for this approach.⁶⁶ In cases such as *Roe*, the Court is clearly using either the ninth amendment or the due process clause to look beyond the "constitutional text for the content of . . . substantive principles."⁶⁷

In his dissent in *Repouille v. United States*,⁶⁸ Judge Frank stated that he was inclined to find "moral conventions [in the] attitudes of our ethical leaders."⁶⁹ Others have also suggested that determining the public morality requires reference to the "best minds of our age";⁷⁰ lest there be a general decline in the standards of justice.

The function of the Justices . . . is to immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and in the sediment of history which is law, and, as Judge Hand once suggested, in the thought and the vision of the philosophers and the poets.

61. Perry, *supra* note 40, at 728.

62. *Id.* at 728-29.

63. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 709 (1975) [hereinafter cited as Grey].

64. Perry, *supra* note 40, at 720.

65. U.S. CONST. amend. IX.

66. Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 36 (1970).

67. Grey, *supra* note 63, at 709. The approach taken by Justice Blackmun in *Roe* is drastically different from the approach he advocates in the capital punishment cases.

68. 165 F.2d 152 (2d Cir. 1947).

69. *Id.* at 154. See also the approach of Justice Blackmun in *Roe*, discussed in note 91 *infra*.

70. G. GOTTlieb, CAPITAL PUNISHMENT 15 (1967) [hereinafter cited as G. GOTTlieb].

The Justices will then be fit to extract "fundamental presuppositions" from their deepest selves, but in fact from the evolving morality of our tradition.⁷¹

Perhaps it is this jurisprudence which legitimates the Court's establishment of first moral principles, on those few occasions when it has risked to do so.⁷²

Recognition of the Constitution as an organic repository of rights and limitations, one which progresses with social evolution, necessarily involves a broader judicial function than one which merely would have the Court apply textually based values. Thus, Supreme Court language which refers to enlightened public opinion⁷³ or "evolving standards of decency"⁷⁴ is an attempt to validate judicial inquiry beyond the four corners of the document. However, instead of employing subjective standards of decency, the Justices nominally search for objective indicators of social moral values.

IV. OBJECTIVE INDICIA OF THE "EVOLVING STANDARDS OF DECENCY"

A. Historic Usage

A great deal of superficial argument derives from the fact that capital punishment was widely in use in 1789 and therefore was approved by the framers. Yet, as will be developed later, "cruel and unusual" demands the most humane alternatives and permits only those punishments which are necessary to achieve legitimate governmental interests. Such was the case at the time eighth amendment was adopted with respect to serious crimes.

How could anyone in 1790 sensibly have demanded that the "evolving standards of decency" require there and then imprisonment rather than death for felons? There were no prisons, no trained custodial and administrative officers, no parole systems, no statutes to authorize creating any of these, no public disposition to obtain them — in short, none of the attitudes, facilities, and personnel obviously necessary to run a system of long-term incarceration.⁷⁵

Flogging and banishment were also widely used punishments at the

71. Perry, *supra* note 40, at 731 n.196 (quoting A. BICKEL, *THE LEAST DANGEROUS BRANCH* 236 (1962)).

72. See text accompanying note 45 *supra*.

73. See notes 29-30 *supra* and accompanying text.

74. See notes 31-32 *supra* and accompanying text.

75. H. BEDAU, *THE COURTS, THE CONSTITUTION AND CAPITAL PUNISHMENT* 14 (1977) [hereinafter cited as H. BEDAU].

time of ratification. Today these have been explicitly disapproved.⁷⁶

This does not mean to suggest that historical usage has no significance. It is safe to assume that all punishments used previously in England which had been abandoned in America are per se unconstitutional.⁷⁷ Professor Wheeler suggests that this category includes all forms of capital punishment involving additional corporal punishment because "no such modes of capital punishment were authorized in 1789 in the United States."⁷⁸ But this analysis does not rule out new methods of punishment such as electrocution.⁷⁹

In *Furman*, Justice Marshall observed: "In light of the meager [constitutional] history that does exist, one would suppose that an innovative punishment would probably be constitutional if no more cruel than that punishment which it superseded."⁸⁰

Existence of the death penalty since America's founding does not per se validate continued use of capital punishment. However, the history of the death penalty does aid in understanding the "evolving standards of decency" to be applied to a constitutional test. Furthermore, the general history of punishment and the social response thereto are equally relevant.

B. Legislation

One of the principal measures of public values, according to the Court in *Gregg*, is the scope of morals legislation. Because of its representative character, the legislature has sole responsibility for determining whether a law is decent or acceptable in terms of community values.⁸¹ This is particularly true with respect to the criminal law. In *Powell v. Texas*,⁸² the Court stated that the criminal law reflected the community's "cultural taboos" and cautioned against the Court's becoming "the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country."⁸³

76. *Trop v. Dulles*, 356 U.S. 86 (1958) (eighth amendment forbids expatriation as punishment for crime); *Jackson v. Bishop*, 404 F.2d 671 (8th Cir. 1968) (use of straps on prisoners held "cruel and unusual" under eighth amendment).

77. *Furman v. Georgia*, 408 U.S. at 330 (Marshall, J., concurring).

78. Wheeler - II, *supra* note 34, at 66.

79. *E.g.*, *In re Kemmler*, 136 U.S. 436 (1890) (electrocution held not "cruel and unusual").

80. 408 U.S. at 331.

81. H. BEDAU & C. PIERCE, CAPITAL PUNISHMENT IN THE UNITED STATES 11 (1976).

82. 392 U.S. 514 (1968).

83. Goldberg & Dershowitz, *supra* note 26, at 1801 n.123. *But see* *Robinson v. California*, 370 U.S. 660 (1962), which certainly placed limits on a legislature's discretion viz. criminal responsibility.

Determining public morality through existing legislation presents an unusual problem. The analysis here is more searching than customary deference to legislation; it encompasses a two-step approach. Not only is the particular capital statute under scrutiny given the normal presumption of validity, punishment statutes in general are canvassed to identify a moral consensus, if one exists. While this comparison is usually made on a national level, reference has been made to international opinion.⁸⁴ As a result, local standards of justice will not prevail if they are at odds with overwhelming practice elsewhere.⁸⁵

By using legislative enactments in general as an indicator of public morality, the Court, in essence, defers to the collective legislatures for their judgments on this social issue. The Court is implying that either because of institutional competence or because of the political nature of this process itself, the legislatures are more appropriately suited to make determinations regarding public morality. "The paucity of judicial decisions invalidating legislatively prescribed punishments is powerful evidence that in this country, legislatures have in fact been responsive — albeit belatedly at times — to changes in social attitudes and moral values."⁸⁶

Institutional competence, as opposed to institutional legitimacy, is a function of the science of lawmaking. Deference on this ground presupposes that, for a variety of reasons, one branch of government is better equipped to make laws than another. The legislature does a superior job because of the tools and facilities available to it, the way the body is constituted, and its experience in similar matters. Thus, deference on matters capable of empirical study, such as economic and social issues, is logical because, if for no other reason, the legislature can and does consider evidence beyond the ken of judges.

[T]he legislature is, or at least can be, a better fact-finding body than an appellate court. The greater number of members and their varied backgrounds and experience make it virtually certain that the typical legislature will command wider knowledge and keener appreciation of current social and economic conditions than will the typical court.⁸⁷

An appellate court's only structural equivalent of the committee hearing is the use of detailed "Brandeis" briefs. For instance, *Furman* was especially noteworthy for the way in which complex and varied social science evidence had been presented in the briefs. Those briefs

84. *Cf. Coker v. Georgia*, 433 U.S. 584, 596 (1977).

85. *See* note 234 *infra*.

86. *Furman v. Georgia*, 408 U.S. at 384 (Burger, C.J., dissenting).

87. Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 209 (1971) [hereinafter cited as Cox].

certainly provided the bases for portions of the plurality opinions.⁸⁸ While this approach may provide information or evidence, there remain structural impediments to its widespread use. Professor Cox has cautioned that "even in skilled hands, [the Brandeis brief] hardly equips a court to decide which side is right about a highly controversial social or economic question — assuming that 'rightness' can be proved."⁸⁹ But herein lies the distinction between economic and social matters on the one hand and issues involving contemporary morals on the other. The special expertise of legislatures in areas of social and economic policy does not necessarily carry over to issues of public morality.⁹⁰

Morals legislation in general presents a peculiar problem of institutional competence. To the extent that factual issues are present, such as the deterrent effects of certain punishments, bodies which are more capable of dealing with empirical evidence should normally be entrusted with initial responsibility. However, where the regulating of public morality is involved, a different type of competence is required. As Professor Tribe suggests, fundamental moral conflicts may be beyond the competence of the polity to resolve.⁹¹

Natural law theories of legal philosophy have insisted that there be some conceptual link between law and morals. On the other hand, le-

88. H. BEDAU, *supra* note 75, at 91.

89. Cox, *supra* note 87, at 209.

90. See Perry, *supra* note 40, at 729:

The point is simply that the Court need not be paralyzed by self-doubt about its institutional ability to determine accurately the contours of the public morals. The Court, as it inquires whether a legislative act serves the public morals, need not assume the same highly deferential posture that it takes toward matters of social and economic policy. In the area of social and economic policy not only are social conventions by and large settled, but the legislature has a special expertise; neither of these observations holds true with respect to many issues in the public morals.

91. Justice Blackmun seems to have adopted this structure in *Roe v. Wade*, 410 U.S. 113 (1973), where he was unwilling to defer to the legislatures' competence in forming judgments on the issue of abortions. In *Roe*, Justice Blackmun invoked, inter alia, classical philosophers, the ALI Model Penal Code, the American Medical Association, the American Public Health Association, and the American Bar Association as enlightening authority indicating that the Texas abortion statute violated substantive due process. The legislative consensus on abortions was rejected in view of the "relative weights of the respective interests involved, . . . the lessons and examples of medical and legal history, . . . the lenity of the common law, and . . . the demands of the profound problems of the present day." *Id.* at 165.

The decision in *Roe* has drawn significant criticism. For instance, John Hart Ely has suggested that the Court had no authority to consider "a question the Constitution has not made the Court's business." Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 943 (1973). See also Justice Rehnquist's dissent in *Roe*: "The Court's opinion . . . is far more appropriate to a legislative judgment than to a judicial one." 410 U.S. at 173. Justice Blackmun was not similarly disposed in the death penalty cases. See *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

gal positivism has stressed their conceptual separability. This is not to deny that moral ideas influence and shape legal norms. Indeed, eighth amendment analysis is nominally based on underlying moral standards. But this approach does dissuade the judge from applying his own moral philosophies to these constitutional concepts.⁹²

In *Furman*, Chief Justice Burger and Justice Powell, in their dissenting opinions, contended that the moral sentiments and beliefs of the public were embodied in the various legislative enactments.⁹³ This version of legal positivism required a reference to "objective indicia" of contemporary values. In this case, the indicia were partially embodied in the statutes under attack. The overwhelming legislative response to *Furman* — a renewal of capital legislation by over two thirds of the states — was seen as compelling evidence of the current public morality and a validation of the approach taken by the dissenters in *Furman*.⁹⁴

Thus, legislative enactments are seen by most of the Justices as readily available indicators of public morality. But they are not conclusive, and in that sense the level of deference to legislative judgment is qualified.⁹⁵

C. Direct Measurement of Public Opinion

The Court's reference to general public opinion has probably caused the greatest controversy. Simply stated, how does the Court structure this measurement? Through the use of popularity polls? By analysis of local referenda and state constitutional amendments?⁹⁶ In a pluralistic

92. Professor H.L.A. Hart states that the separation of law and morals, even as an adjunct to the moral criticism of law, is a characteristic of the English legal system. See Richards, *Rules, Policies and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 *GEORGIA L. REV.* 1069, 1112 (1977). American legal structures, on the other hand, such as constitutional adjudication and judicial supremacy, are better explained by natural law jurisprudence. "Since the judiciary is thus still a lively focus for moral reform, and indeed enforces and vindicates a charter of morally based constitutional principles, positivism is not, for Americans, a necessary useful adjunct to moral reform." *Id.* at 1114.

Perhaps Hart's description accurately explains the Court's moral activism in the family and abortion cases, see notes 45 & 91 *supra* and accompanying text, but it did not fairly predict the response to capital punishment challenges. However, Hart's description does suggest that the Court's attitude in the death penalty cases may be a departure from, rather than an adherence to, prior theories of adjudicating fundamental rights.

93. 408 U.S. at 375, 383, 414.

94. See also Note, *Capital Punishment: A Review of Recent Supreme Court Decisions*, 52 *NOTRE DAME L. REV.* 261, 279 (1976) [hereinafter cited as *Capital Punishment*].

95. Justice Stewart's opinion in *Gregg*, for instance, acknowledged that limits exist on this deference, both in terms of reliability and constitutional standards. *Gregg v. Georgia*, 428 U.S. at 173-74. See also text accompanying note 168 *infra*.

96. See, e.g., *Gregg v. Georgia*, 428 U.S. at 181, where Justice Stewart specifically pointed

society, which elements are given greater weight in completing the calculus? Are some elements, for example the prison population, given no weight at all? And what if public opinion, albeit supportive of capital punishment, is misinformed as Justice Marshall contends?

Measuring society's moral pulse by the use of public opinion polls which are limited to issues of capital punishment may not be accurate at all in assessing contemporary standards of human dignity. Those standards should not be viewed as moving in one direction with respect to general notions of criminality and punishment and in another with respect to particular notions of capital crimes. "Humane justice" should contemplate the broad spectrum of social response to crime; as treatment of offenders in general becomes liberalized, so too should capital punishment be considered part of the whole penological picture. The search for evolving standards should include a comparison of what society once did to criminals with what it now does.⁹⁷ Thus, it is somewhat inconsistent to see a liberalizing trend in social response to punishment on the one hand and an approach which ignores this trend when dealing with capital punishment. The historical analysis, which at one point seemed important to the Court in *Gregg*, suggests that capital punishment issues require a broader consideration of standards of decency. However, the Court appears willing to accept a narrower concept of public morality and relies, in part, on such restricted indicators of public sentiment.⁹⁸

Perhaps direct measurement of public opinion on capital punishment should be the leading gauge of contemporary standards of decency for eighth amendment analysis. The dissenters in *Furman* and the majority in *Gregg* determined that public opinion did in fact equate with standards of contemporary decency. They examined public opinion through direct measurement such as polls, state constitutional amendments,⁹⁹ and the actions of capital juries, as well as through legislative enactments.

However, reliance on public sentiment as the equivalent of public morality is somewhat misplaced. Public sentiment is undoubtedly based, in part, upon perceptions of events, cause and effect, and other

out that California voters had amended the state constitution to reinstate capital punishment in response to *People v. Anderson*, 6 Cal. 3d 628, 439 P.2d 889, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972).

97. See G. GOTTLIEB, *supra* note 70, at 14 and part IV A.

98. Virtually every public opinion poll cited in the capital punishment cases is limited to questions on the acceptability of death sentences and not punishment in general. See note 143 *infra*.

99. See note 96 *supra*.

social phenomena. Justice Marshall rested his opinion in *Furman* on the ground that mass public opinion which favored capital punishment was an improper measurement. He considered separately that portion of the public which favored capital punishment due to a utilitarian belief in the deterrent effect of the death penalty. Because this portion of the public based its opinion, at least partially, on matters capable of scientific proof, Justice Marshall felt that it would be unwise to allow uninformed or misinformed public opinion to influence a constitutional standard.¹⁰⁰

Justice Marshall discounted almost entirely that portion of the public which based its advocacy of capital punishment upon retributive beliefs. To Marshall, neither retribution nor vengeance could form any part of the criminal sanction and neither could be the basis for its acceptability; this is just what the eighth amendment was designed to prohibit.¹⁰¹

That public sentiment equates to some extent with public morality seems self-evident. But several questions arise from this assumption which are apparently overlooked by the Justices, with the notable exception of Justice Marshall. For instance, without doubting the accuracy of public opinion polls, one of their faults is their instantaneous nature of measurement. Is public opinion relevant on the day of argument before the Supreme Court? On the day the challenged death statute was enacted?¹⁰² On the day of the crime?¹⁰³ Or should the Court be looking at trends; at public opinion over time? And if so, over how long a period of time?

100. 408 U.S. at 344-45.

101. *Id.*

102. Especially when recognizing evolving standards of decency, the state of public morality, at the time that a long-standing piece of legislation was enacted, might not be all that relevant. See Victor, *Furman v. Georgia: The Burger Court Looks at Judicial Review*, 1972 LAW & SOC. ORD. 393, 398 [hereinafter cited as Victor]: "The deference usually owed legislative acts likewise may not be justified when the challenged statute has remained on the books for an extended period of time, untouched and unconsidered by the legislature." See also *Roe v. Wade*, 410 U.S. at 148, 151. All capital statutes now existing are recent enactments, but that does not per se indicate an underlying moral consensus. See note 191 *infra* and accompanying text. Furthermore, much of the rush to reinstate capital punishment after *Furman* was done without reexamining relevant social criteria. Victor, *supra* at 402.

103. In *Dobbert v. Florida*, 432 U.S. 282 (1977), the Supreme Court upheld defendant's death sentence for a murder that he committed prior to the decision in *Furman*. *Furman* had also invalidated the Florida statute then in existence, by implication, so that there was no death penalty "in effect" in Florida at the time of the murder. Insofar as petitioner was tried and sentenced after *Furman*, under a statute found valid in *Proffitt v. Florida*, 428 U.S. 242 (1976), the death sentence was affirmed. The Court ruled that Florida had put the defendant on "constructive notice" of the penalty which the state would seek to impose on him for the crime.

What do surveys of public opinion indicate about attitudes toward the death penalty? Such attitudes have been periodically assessed in nationwide surveys for about 40 years. For the first 30 of these years opinion moved steadily against the death penalty; from a high of 62 percent in 1936, support for the death penalty declined until 1966, when only 40 percent of the American people registered in favor of it. However, in the last 10 years, the downward trend has reversed dramatically; recent polls indicate that about 60 percent of the public now favors capital punishment.¹⁰⁴

In an interesting twist on the dangers incumbent with short-term measurement, the dissenters in *Coker v. Georgia*¹⁰⁵ cautioned that instantaneous reading of legislative enactments was misleading. The fact that Georgia was the sole jurisdiction then authorizing capital punishment for rape was termed by Chief Justice Burger as "not particularly relevant." "[T]wo other states — Louisiana and North Carolina — have enacted death penalty statutes for adult rape since this Court's 1972 decision in *Furman v. Georgia* If the Court is to rely on some 'public opinion' process, does this not suggest the beginning of a 'trend'?"¹⁰⁶ But the Court in *Woodson v. North Carolina*,¹⁰⁷ seemed unwilling to accept evidence of a "sudden reversal of societal values" in assessing the constitutionality of mandatory death penalties. The *Woodson* Court escaped the quandry presented here by discounting the genuineness of post-*Furman* enactments as true demands for mandatory sentencing.¹⁰⁸

One of the virtues of the constitutional amendment process is that it is slow. Instantaneous public sentiment might influence legislation, but the major principles of American jurisprudence and the fundamental rights of our society cannot be so readily changed.¹⁰⁹ Commenting on this issue, the Massachusetts Supreme Court in *Commonwealth v. O'Neal*¹¹⁰ stated:

Passing public passions and emotions (understandable as they may be at times such as these) have little to do with the meaning of the Constitution, as it is written. Referendums, although they serve some purpose, do not pretend to construe the Constitution. They express only ephemeral sentiments, sentiments which are highly variable over time and which may reflect public attitudes shaped by collateral problems and events of the day. Public sentiment becomes relevant to constitutional adjudication

104. Sarat & Vidmar, *supra* note 10, at 175 (footnotes omitted).

105. 433 U.S. 584 (1977).

106. *Id.* at 613.

107. 428 U.S. 280 (1976).

108. *Id.* at 298.

109. See Goldberg & Dershowitz, *supra* note 26, at 1778-82 & n.39.

110. 339 N.E.2d 676 (Mass. 1975).

only if it results in a constitutional amendment. This is a result which occurs only when the public sentiment is sufficiently high and sustained so that it is not dissipated with the passing of time and further reflection.¹¹¹

A similar view was expressed by former Chief Justice Donald Wright of the California Supreme Court in commenting on *People v. Anderson*.¹¹² But notwithstanding the approaches which prevailed in California and Massachusetts, the United States Supreme Court clearly has a different view on the importance of public opinion.¹¹³ The voters of California did respond to *Anderson* with a constitutional amendment which reinstated the death penalty. But it is the amendment itself, and not anticipation of it, which should affect the interpretation of "cruel and unusual."¹¹⁴

Another use of popular sentiment might validly be found under a constitutional test which links popular morality to the *level* of eighth amendment protection. Perhaps the level of deference to legislative judgment should depend upon the strength of public support for particular criminal legislation. As it now stands, the burden of proof on the factual issues associated with capital punishment rests with the challengers.¹¹⁵ If contemporary standards of decency, as measured by public sentiment, clearly favored capital punishment with overwhelming

111. *Id.* at 692 (emphasis in original).

112. 6 Cal. 3d 628, 648-49, 493 P.2d 880, 893, 100 Cal. Rptr. 152, 165-66, cert. denied, 406 U.S. 957 (1972). See also Wright, *The Role of the Judiciary: From Marbury to Anderson*, 60 CALIF. L. REV. 1262, 1273 (1972).

113. See *Gregg v. Georgia*, 428 U.S. at 179-83.

114. Thus, the fact that the people of California amended their Constitution after the highest court of that State declared the death penalty unconstitutional does not indicate to me that we should not reach and decide a properly presented constitutional issue in accordance with our considered views of the statute and Constitution. It merely indicates the possibility that an amendment to our Constitution *may* be the popular response to our decision. If this eventuates, so be it. The amendment, and not a judicial anticipation of such a response, is the proper constitutional procedure.

Commonwealth v. O'Neal, 339 N.E.2d at 692-93 (emphasis in original).

115. The blanket presumption of a deterrent effect of capital punishment is seemingly at odds with fundamental rights of jurisprudence in other areas. In *Gregg*, Justice Stewart stated: "We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent." 428 U.S. at 185-86. This "intuitive" observation ignores the development of "strict scrutiny" analysis flowing from the famous footnote number four in *U.S. v. Caroline Prods.*, 304 U.S. 144, 152 n.4 (1938).

The only logical explanation of this approach is that the fundamental right found in the eighth amendment is not the guarantee of life per se, but only of humane sentences. Consequently, the legislature need not bear the burden of justification regarding the deterrent effect of capital punishment until such time as "contemporary standards of decency" embrace the right not to be executed as fundamental.

The problem with this logic is that conventional morality purportedly tolerates capital

support, then all presumptions of validity might rest with the legislatures. But as the Court becomes less sure of public sentiment, as in the death penalty area where opinion is divided, a capital statute should require a greater level of justification in order to be sustained. As standards of decency become less tolerant of capital punishment, a stronger nexus should be required between executions and the social goals sought to be obtained thereby.

Justice Marshall suggested a similar approach to equal protection scrutiny in his dissent in *San Antonio Independent School District v. Rodriguez*:¹¹⁶

A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected¹¹⁷

Divining the public morals is a problem recurrent throughout constitutional litigation.¹¹⁸ It has wended its way into the criminal law in "shock the conscience" tests¹¹⁹ and is now institutionally a part of eighth amendment jurisprudence. The arguments against the use of public sentiment to gauge the moral standards of society are strong. For instance, Professor Hart states:

To tell judges that the expression of the community's moral indignation is "the ultimate justification" of punishment is to tempt them from the task of acquiring knowledge of and thinking about the effects of what they are doing. And for the community to think that there is something sacrosanct about its scale of moral evaluations may, as Mill long ago told us, stultify its advance. For these evaluations may plainly rest on inadequate understanding or appreciations of facts Or should we hope that the law might here and elsewhere not passively reflect uninstructed opinion but actively help to shape moral sentiments to rational common ends?¹²⁰

Notwithstanding, the majority of the Justices appear to reject this the-

punishment, in part, because of its presumed deterrent effect. It seems the Court has assumed the conclusion in order to prove the premise. See also note 19 *supra*.

116. 411 U.S. 1 (1973) (Marshall, J., dissenting).

117. *Id.* at 98-99. See also Angel, *supra* note 24, at 64: "[In substantive due process analysis, the] nexus required between means and ends depends on the importance of the interest affected by the legislation."

118. Perry, *supra* note 40, at 709.

119. Cf. *Furman v. Georgia*, 408 U.S. 238, 360-61 (1972) (Marshall, J., concurring); *Rochin v. California*, 342 U.S. 165 (1952); *United States v. Rosenberg*, 195 F.2d 583, 608 (2d Cir. 1952), *cert. denied*, 344 U.S. 838 (1952).

120. H. HART, PUNISHMENT AND THE ELIMINATION OF RESPONSIBILITY 16-17 (1962).

ory of judicial review, preferring a notion of human dignity that is tied to popular sentiment and holding that in interpreting the eighth amendment, the Court will objectively search out that sentiment.¹²¹

D. Jury Action

Because the standard for humane punishments is tied to contemporary moral values, the jury provides a necessary and reliable gauge of those values.

[O]ne of the most important functions any jury can perform in making such a selection [between sentences of death and imprisonment] 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.”¹²²

In *Witherspoon v. Illinois*,¹²³ the Court struck down a statute which provided for the exclusion for cause of any juror “who shall, on being examined, state he has conscientious scruples against capital punishment, or that he is opposed to the same.”¹²⁴ Justice Stewart’s majority opinion held that such “death qualified” juries violated the defendant’s sixth amendment¹²⁵ right to an impartial jury. To do otherwise would be to insulate the sentencing process from the community and to “entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death.”¹²⁶

The procedural due process and sixth amendment analyses of *Witherspoon* are readily applied in an eighth amendment context.¹²⁷ All of the capital cases have referred to jury action as an indicator of contemporary morals. This goes beyond *Witherspoon*; not only will an individual defendant enjoy the possibility of jury lenity, but broad-based jury rejection of death sentences might influence the constitutionality of the death penalty for all defendants.

121. *Gregg v. Georgia*, 428 U.S. at 175.

122. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1967) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

123. 391 U.S. 510 (1967).

124. ILL. REV. STAT. ch. 38, § 743 (1959).

125. U.S. CONST. amend. VI.

126. *Witherspoon v. Illinois*, 391 U.S. at 521.

127. *But see* Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L.L. REV. 269, 295 (1975) [hereinafter cited as Tribe]. Professor Tribe views *Witherspoon* as most comprehensible as an eighth amendment decision. As such, it would be an analytic approach to the eighth amendment, relying upon the sixth amendment for specific standards. This explanation seems accurate, especially in light of the Court’s statement: “Nor does the decision in this case affect the validity of any sentence *other* than one of death.” *Witherspoon v. Illinois*, 391 U.S. at 523 n.21 (emphasis in original).

In *Furman*, Justice Brennan suggested that the relative infrequency of death sentences meted out by capital juries indicated public antipathy for these punishments.¹²⁸ Justice Powell came to the opposite conclusion in his dissent: "[T]hese [statistical] considerations fall short of indicating that juries are imposing the death penalty with such rarity as to justify this Court in reading into this circumstance a public rejection of capital punishment."¹²⁹ Whichever way the figures are found significant, most members of the Court do recognize that jury action is one of the objective indicia referred to in assessing contemporary values.¹³⁰

Juries might be constrained to reflect their conscience in the verdict rather than in decisions on appropriate sentences. This might occur whenever a particular sentence is automatically imposed upon a finding of guilt. This "jury nullification" — rejection of the legislatively declared sentence — results in acquittals or verdicts of lesser included offenses, despite evidence establishing culpability for the charged offense. Consequently, the jury reflects community values through its expression of the appropriate punishment for a particular offense. "If juries were regularly refusing to convict men of a particular crime when cognizant of the statutory punishment, it would be absurd to contend that the punishment is proportional to the crime."¹³¹

Jury action on a statistical basis may have a great bearing on eighth amendment standards. This may be of little solace for those defendants who find themselves before particularly unsympathetic juries. Although the Supreme Court has suggested a structure which compares each capital jury to every other one within the state, none of the opinions reveals what level of jury rejection of death sentences would be significant for eighth amendment purposes.

V. JUSTIFICATIONS FOR CAPITAL PUNISHMENT

A. Deterrence

Deterrence is a justification for punishment because as a component of utilitarianism it produces a net beneficial good for society. Utilitarianism is the basis for Jeremy Bentham's theory of legislation¹²³—a the-

128. 408 U.S. at 399 (Brennan, J., concurring).

129. *Id.* at 441 (Powell, J., dissenting).

130. See *Gregg v. Georgia*, 428 U.S. at 181.

131. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 848 (1972) [hereinafter cited as Wheeler-I]. See notes 180-87 *infra* and accompanying text.

132. J. BENTHAM, THE THEORY OF LEGISLATION 93-94 (1931): "According to the princi-

ory which is central to our system of government. Proportionality requirements reflect the utilitarian principle that no penalty may cause more suffering than the crime unchecked.¹³³

There are many value judgments implicit in the supposition that capital punishment deters. It is a rejection, or at least a setting aside, of other moral arguments against sanctioned execution which may lessen their utilitarian value. More importantly, arguments based on deterrence often fail to consider the net detrimental effects on society (also part of utilitarianism) which are caused by capital punishment.¹³⁴ This is not to imply that such detrimental effects are ignored. The prime example of their recognition is the discontinuance of the public execution. Just as violence on television is suggested to replicate itself on the streets, public executions seemingly remove some of the moral reprobation for killing in general. But these effects may be beyond determination and are always absent from the sociologist's study. Due to their amorphous character, these long-term social effects are usually omitted from arguments based on deterrence.

Deterrence relies on each individual's hedonistic utilitarianism. Each of us, according to Bentham, acts as a utility maximizer. Consequently, the utilitarian model envisions the rational criminal's weighing the potential discomfort — punishment — against the expected gain from committing a crime. This can be expressed analytically as follows: the pain of sanction, discounted by the improbability of being caught and punished, must be more than the pleasure derived from the offense; otherwise, the crime will be committed. However, murder is the only crime worthy of capital punishment,¹³⁵ and it is seldom perpetrated by rational thinking individuals who are thinking rationally at the time of the crime.¹³⁶ Thus, the immediate gain virtually always appears to exceed the potential cost because that cost is usually not

ple of utility, [the legislature] ought never to impose a burden except for the purpose of conferring a benefit of a clearly greater value."

133. See notes 180-87 *infra* and accompanying text.

134. Professor Collin Turnbull has written a graphic and compelling description of the social impact of capital punishment from an anthropological perspective. Turnbull, *Death by Decree*, NAT. HIST., May 1978, at 65:

All this horror, a result of the technology, is surely one of the most telling arguments against capital punishment, for the strain and stress, the alcoholism, broken families, and mental breakdown reach out beyond the confines of the prison. So does the brutalization that mars the lives not only of inmates but of all those touched by the death penalty . . .

135. See note 217 *infra* and accompanying text.

136. This observation is contrary to Justice Stewart's assumption that "for many [murderers], the death penalty undoubtedly is a significant deterrent." *Gregg v. Georgia*, 428 U.S. at 185-86.

considered. Few murderers are rational utilitarians at the time of their acts.

The qualitative jump in pain from life imprisonment to execution¹³⁷ should be significantly outweighed by the improved deterrence observed. But the best to be said at this point, after years of study in scores of countries, is that the evidence is inconclusive. The utilitarian operates on the assumption that a definite pain is ultimately offset by a collective good. If this hypothesis is not capable of proof, or yet proven, does utilitarianism alone justify infliction of the pain?

The Supreme Court has not required that deterrence be the sole factor in assessing the propriety of a punishment; it also permits consideration of retributive theory. However, the extent to which retribution actually contributes to popular sentiment, and thus to contemporary standards of decency, is not well known. And the degree to which it may support the legislatures' determinations of proper punishments is not clearly explained. Neither the quality of retributive feelings nor a proper description of this moral justification is discussed in the capital cases.

B. Retribution

The majorities in the death penalty cases were willing to accept retribution as a valid factor in measuring contemporary standards of decency. "Retribution is no longer the dominant objective of the criminal law, . . . but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men."¹³⁸

In his concurrence in *Furman*, Justice Stewart was unwilling to reject retribution as an appropriate consideration of criminal sanctions, a sentiment shared by many of the Justices:

I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy . . .¹³⁹

Retribution as an element of the criminal sanction causes significant

137. See *id.* at 187: "There is no question that death as a punishment is unique in its severity and irrevocability."

138. *Id.* at 183.

139. 408 U.S. at 309.

problems both in definition and in justification. As a theory of "right," pure retribution ostensibly serves a useful purpose by reinforcing society's basic moral values. Opponents of retribution, from Aristotle to Justice Marshall, argue that this moral theory "looks only to the past and serves no useful future social purpose."¹⁴⁰ Indeed, retribution is concerned only with past events; forward looking interpretations or justifications tend to be utilitarian in nature.¹⁴¹

However, the retribution spoken of in *Furman* and *Gregg* transcends Kant's pure moral theory of right and approaches utilitarian justification. Justice Stewart's perception of retribution is nothing more than deterrence. Not deterrence of potential criminals but of the public at large which may otherwise become dissatisfied with our system of justice and take matters into its own hands. The "anarchy of self-help, vigilante justice, and lynch law," was what Justice Stewart saw looming on the horizon.¹⁴² This is surely not the pure retributive philosophy of Kant. It is also not beyond the sociologists' empirical methods to determine whether a particular punishment does in fact serve the social ends of stability, harmony, and respect for legal process. If these theoretical underpinnings of capital punishment were acknowledged, it is unlikely they could lend much support for its continued validity. "[T]here exists no persuasive documentation that either the availability or the imposition of capital punishment deters private citizens from exacting illegal vengeance. 'Lynch law' clearly has not become common during this century even though a progressive abandonment of the death penalty has occurred."¹⁴³ Retributive theories are commonly explained in terms of social benefit and are thereby becoming utilitarian in nature. To many critics, pure retribution is "the abandonment of any serious attempt to provide a moral justification for punishment."¹⁴⁴

The contrast between deterrence and retribution is highlighted here because they are the two justifications for capital punishment employed

140. Angel, *supra* note 24, at 79 n.68.

141. H. HART, PUNISHMENT AND RESPONSIBILITY 232 (1968) [hereinafter cited as H. HART]. Hart uses a retributive model which excludes possible future social benefits which might otherwise flow from punishment of an offender. This feature derives from Kant who insisted that responding to moral misconduct with suffering is a good per se — a moral imperative — so that even on the last day of society, when utilitarian considerations are, by premise, absent, "the murderer not only may but must be executed." *Id.* at 75.

142. 428 U.S. at 183; 408 U.S. at 308.

143. Thomas, *Eighth Amendment Challenges to the Death Penalty: The Relevance of Informed Public Opinion*, 30 VAND. L. REV. 1005, 1017 n.51 (1977) [hereinafter cited as Thomas].

144. H. HART, *supra* note 141, at 235.

by both proponents and critics.¹⁴⁵ Both theories are validated in *Gregg*, but their postures are conceptually different. The validity of deterrence as a justification is capable of being tested and is being tested.¹⁴⁶ Consequently, challengers to the death penalty may soon be able to approach the burden of proof placed upon them by the Supreme Court with acceptable evidence.¹⁴⁷

On the other hand, pure retributive theories cannot be tested. Accordingly, it is important to know the following: Does the Court actually rely on utilitarianism or retribution? If the Court relies on retribution, to what extent does it so rely?¹⁴⁸ What portion of the public which supports capital punishment bases its acquiescence on its belief in the deterrent value of capital punishment? If, for instance, public support is based principally on retributive theories, could this alone define the contours of standards of decency? If this were the case, studies on the deterrent effect of capital punishment would lose vitality in endeavoring to undermine or support its constitutionality.

VI. STUDIES ON PUBLIC OPINION

When *Furman* was decided, there were few sophisticated studies on the breadth and scope of public opinion. Only superficial polls were available. These polls indicated a recent upswing in public demand for capital punishment.¹⁴⁹ But as a result of their superficiality, Justice

145. Justice Stewart refers to a third purpose, incapacitation of dangerous criminals. *Gregg v. Georgia*, 428 U.S. at 187 n.28. But this is merely an aspect of utilitarian theory and, in fact, of deterrence. The incapacitation of dangerous criminals specifically deters a defendant from committing future crime, as opposed to generally deterring third persons from illegal conduct. It is obvious that capital punishment is a better incapacitator than lesser sanctions, but the Court has never suggested that this, standing alone, justifies the penalty.

Although in *Roberts v. Louisiana*, 428 U.S. 325 (1976), the dissenters stressed that "death finally forecloses the possibility that a prisoner will commit further crimes," they focused on general deterrence as the "principal battleground" for constitutional analysis. *Id.* at 354. *Coker v. Georgia*, 433 U.S. 584 (1977), also suggests that the state's need for effective incapacitation cannot overcome the constitutional requirement of proportionality. But see *id.* at 605 (Burger, C.J., dissenting).

146. See note 163 *infra*.

147. In *Gregg*, the plurality felt forced to conclude, "in the absence of more convincing evidence, that the infliction of death . . . is not unconstitutionally severe." 428 U.S. at 218. Just how convincing the evidence must be remains unclear. If new studies show the absence of a superior deterrent effect with increasing reliability, the Justices may have to place greater reliance on retributive justifications or take an absolutist approach regarding deference, as does Justice Rehnquist.

148. "Critics further argue that retribution can set the limit on the amount of punishment that should be imposed, but cannot itself justify the imposition of any punishment." Angel, *supra* note 24, at 79 n.68. See also *Gregg v. Georgia*, 428 U.S. at 236-40 (Marshall, J., dissenting).

149. See note 104 *supra* and accompanying text.

Marshall discounted these figures as being unreliable. He suggested that the American public was uninformed or misinformed about the reality of capital punishment, particularly its deterrent value. Marshall suggested that "informed opinion" would reject the death penalty. To Marshall, the only credible public opinion was that which appreciated that "the death penalty is no more effective a deterrent than life imprisonment, that convicted murderers are rarely executed . . . that convicted murderers are usually model prisoners . . . that they almost always become law abiding citizens upon their release from prison" and that the penalty is imposed in a discriminatory manner.¹⁵⁰ Between the *Furman* and *Gregg* decisions, several studies were undertaken to test the "Marshall hypothesis."¹⁵¹

In *Furman*, I observed that the American people are largely unaware of the information critical to a judgment on the morality of the death penalty, and concluded that if they were better informed they would consider it shocking, unjust, and unacceptable. A recent study, conducted after the enactment of the post-*Furman* statutes, has confirmed that the American people know little about the death penalty, and that the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty.¹⁵²

A study conducted by Sarat and Vidmar¹⁵³ basically lends credence to Justice Marshall's theory that a significant portion of public support for the death penalty comes from an uninformed populous.

It was found that our subjects knew little about the death penalty, particularly its effectiveness. It was also found that when exposed to information about capital punishment, especially information regarding its utilitarian aspects, a substantial proportion of the subjects altered their opinions toward it. . . . [E]ven a cautious reading of our results leads to the conclusions that an informed public opinion about the death penalty may differ substantially from one that is uninformed and that these differences in support may be almost totally accounted for by persons who do not consider retribution as a legitimate, or at least important, justification for capital punishment.¹⁵⁴

The Sarat and Vidmar study was considered important by Justice Marshall, particularly in light of an intervening study by Isaac Ehrlich¹⁵⁵

150. Sarat & Vidmar, *supra* note 10 at 179.

151. See *Gregg v. Georgia*, 428 U.S. at 232-36 (Marshall, J., dissenting).

152. *Id.* at 232 (footnotes omitted).

153. Sarat & Vidmar, *supra* note 10.

154. *Id.* at 195-96.

155. Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975) [hereinafter cited as Ehrlich]. Ehrlich concluded that, "in view of the new evidence presented here, one cannot reject the hypothesis that law enforcement activities in general and execution in particular do exert a deterrent effect on acts of murder." *Id.* at 416.

which found that a systematically employed capital statute would in fact deter homicide.¹⁵⁶

Sarat and Vidmar's analysis of the Marshall hypothesis impressed no other Justice with the possible exception of Brennan. Part of the reason might be that the study did little to discover the extent of support which retributive beliefs lent to the use of capital punishment. Retribution, vengeance, and even the broader concept of reprobation are beyond empirical proof. These concepts may be analyzed. Unlike utilitarian justifications, however, they are not capable of being correct or incorrect. The fact that Americans believe in these concepts is the important element, not why they may have these beliefs.

Professor Charles Thomas conducted a study prior to *Gregg* and after *Furman* in which he sought to identify the determinants of public support for capital punishment.¹⁵⁷ He attempted to separate retributive from deterrent sentiments. Thomas found that the two factors were strongly related, that persons holding utilitarian or deterrent beliefs tended to embrace retributive sentiments, and vice versa.¹⁵⁸ Consequently, many people in favor of the death penalty support it because they believe it to be morally just *and* because as a deterrent, it is beneficial for society. However, in analyzing the relative strengths of these disparate factors of support, Thomas found as follows:

[A]lthough the independent impact of retributive beliefs on support for capital punishment is relatively weak, the independent effect of utilitarian beliefs is substantial. Thus apparently those in the sample subscribing to retributive beliefs about punishment are not willing to support capital punishment unless they also believe that it serves some useful purpose — deterrence.

. . . [R]etributive beliefs do correlate with a willingness to support the death penalty, but only when these notions of just punishment are bolstered by the complementary belief that the imposition of the death penalty will serve what they view as a useful purpose.¹⁵⁹

Thomas did not find the reverse to be true; persons who exhibited predominantly utilitarian support for capital punishment generally maintained that support when the factor of retribution was statistically removed.¹⁶⁰ Thomas' study does not easily convert into simple per-

156. The Ehrlich study has come under attack. See studies collected in *Gregg v. Georgia*, 428 U.S. at 235 n.8 (Marshall, J., dissenting).

157. Thomas, *supra* note 143, at 1016.

158. *Id.* at 1018-20. This was accomplished through the use of multivariate analysis, which essentially holds constant the influence of retributive belief on each member of the sample while testing for belief in deterrent values; it then similarly tests for retributive support by holding the effect of deterrence support constant.

159. *Id.* at 1024-26.

160. *Id.* at 1026.

centages of those who voiced support based solely on retributive beliefs; his analysis is more comparative than absolute. But it can be read to suggest that less than one fourth of his sample believed retribution to be a sufficient justification for capital punishment.¹⁶¹

The Thomas study does suggest that support for the death penalty is based predominantly on belief in its deterrent value. But the majority in *Gregg* concluded that "there is no convincing empirical evidence either supporting or refuting" the superior deterrent effect of capital punishment.¹⁶² Still the best, albeit inconclusive, evidence indicates that capital punishment provides no overall superior deterrent effect.¹⁶³

These two converging areas of statistical analysis — the first consisting of the Marshall hypothesis and the Thomas study, the second casting substantial doubt on the deterrent value of capital punishment — undermine a constitutional standard which would have an unexamined and superficial public opinion determine the contours of the eighth amendment. The "evolving standards of decency that mark the progress of a maturing society"¹⁶⁴ are not coterminous with public opinion polls. Notwithstanding a possible enlightenment of public opinion, a more difficult problem might arise if legislatures were still to respond to that segment of society which demanded capital statutes. The capital cases may suggest that legislative judgments standing alone do not satisfy the Court.¹⁶⁵ To Justice Marshall, developments since *Gregg* have underscored his contention that legislative judgments do not reflect contemporary standards of decency. In *Lockett v. Ohio*,¹⁶⁶ he remarked: "That the State of Ohio chose to permit imposition of the death penalty under a purely vicarious theory of liability seems to belie the notion that the Court can discern the 'evolving standards of decency' . . . embodied in the Eighth Amendment, by reference to state

161. *But see* Sarat & Vidmar, *supra* note 10, at 176, 191-94 & n.90. "Because death penalty support remained firm even when beliefs about deterrence changed, we are thus inclined to infer that retribution is probably a causal factor working against movement of death penalty opinion." *Id.* at 194 n.90.

162. 428 U.S. at 185.

163. *See primarily* authorities collected in *Gregg v. Georgia*, 428 U.S. at 183 n.29, 235 n.8; T. SELLIN, CAPITAL PUNISHMENT 138 (1967); Sellin, *The Death Penalty* 23-24, in MODEL PENAL CODE, Appendix (Tent. Draft No. 9, 1959). *But see* Ehrlich, *supra* note 155; Lehtinen, *supra* note 12, at 238 ("[T]here is no evidence that proves the death penalty is not a unique deterrent.").

164. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

165. "Although legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values, it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power." *Gregg v. Georgia*, 428 U.S. at 174 n.19.

166. 98 S. Ct. 2954 (1978).

'legislative judgments'" ¹⁶⁷

VII. "EXCESSIVENESS" AS A LIMIT ON THE USE OF OBJECTIVE INDICIA

The plurality in *Gregg* qualified the use of public opinion and legislative enactments as indicators of public morality:

[O]ur cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment". . . . This means, at least, that the punishment not be "excessive." ¹⁶⁸

This qualification has been reiterated in each capital case since *Gregg*. It has been partially responsible for the judgments in those cases which have invalidated the following: mandatory death penalties;¹⁶⁹ the death penalty for rape;¹⁷⁰ and limitations on the use of mitigating circumstances by the sentencing body.¹⁷¹ The excessiveness limitation prohibits those punishments which involve the unnecessary infliction of pain or those which are disproportionate to the offense.

A. Unnecessary Infliction of Pain

The first component of excessiveness, that the punishment may not involve the unnecessary infliction of pain, might seem to require that penologic objectives be achieved through the least severe method possible.¹⁷² Naturally, this would embroil the Court in the controversy over the utility of capital punishment as a deterrent, a matter which it has chosen to defer to the competence of the legislatures. Instead, the capital punishment cases have interpreted the excessiveness limitation as requiring that any given punishment be imposed without additional pain which otherwise adds nothing to the purpose of that punishment. In *Wilkerson v. Utah*,¹⁷³ the Court found it "safe to affirm that punishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden by [the eighth] amendment to the Constitution."¹⁷⁴ Consequently, corporal punishment attendant with the execu-

167. *Id.* at 2972 (Marshall, J., concurring).

168. 428 U.S. at 173.

169. *Roberts (Harry) v. Louisiana*, 431 U.S. 644 (1977) (per curiam); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

170. *Coker v. Georgia*, 433 U.S. 584 (1977).

171. *Bell v. Ohio*, 98 S. Ct. 2977 (1978); *Lockett v. Ohio*, 98 S. Ct. 2954 (1978).

172. See note 178 *infra* and accompanying text.

173. 99 U.S. 130 (1879).

174. *Id.* at 136.

tion of a death sentence is unnecessary and therefore excessive. In *Francis v. Resweber*,¹⁷⁵ after an unsuccessful first attempt, a second attempt at electrocution was held constitutional because the added pain was unintentional. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot add an element of cruelty to a subsequent execution.¹⁷⁶ Prior to *Furman*, the cases employing the necessity test¹⁷⁷ all involved challenges to the mode of execution. Basically, they held that the only modes of execution permitted by the eighth amendment are those in which death is not lingering. All others are unnecessarily cruel.

In *Furman*, Justices Brennan and Marshall applied the necessity test to the penological purpose of the punishment itself, suggesting an extension of the cases cited above. Justice Brennan stated that, "[A] severe punishment must not be excessive If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, . . . the punishment inflicted is unnecessary and therefore excessive."¹⁷⁸ To Justices Stewart and White, the punishment was unnecessary where its infrequent and wanton application under the discretionary statutes served no penal justification.

[T]he death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment At the moment that it ceases realistically to further these purposes . . . the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.¹⁷⁹

175. 329 U.S. 459 (1947).

176. *Id.* at 464. Professor Wheeler suggests two grounds upon which an intentional added punishment might be declared unconstitutional:

(1) The legislative body did not authorize corporal punishment in addition to execution, so the intentionally added punishment would have been beyond the scope of the penal administrators' power and hence unconstitutional; and (2) execution preceded by the painful application of electrical current is a new and unusual punishment which fails to satisfy [the goals of the criminal sanction]. Furthermore, it adds nothing to incapacitation that immediate execution does not supply.

Wheeler-II, *supra* note 34, at 69 n.34.

177. *Francis v. Resweber*, 329 U.S. 459 (1947) (challenging electrocution as a valid mode of execution); *In re Kemmler*, 136 U.S. 436 (1890) (same); *Wilkerson v. Utah*, 99 U.S. 130 (1879).

178. *Furman v. Georgia*, 408 U.S. at 279 (Brennan, J., concurring).

179. *Id.* at 311-12 (White, J., concurring). Justice Stewart stated:

In the final analysis, however, the majorities in *Gregg* and the capital cases which followed were unwilling to deny that valid state purposes could be served by death penalties pursuant to carefully drawn statutes. Consequently, it could not be said that capital punishment per se was clearly unnecessary.

B. Proportionality

The more important aspect of the excessiveness limitation is its requirement for proportionality in sentencing. Professor Wheeler suggests that necessity tests employed in the death penalty cases can be adequately explained under the concept of proportionality.¹⁸⁰ He further suggests that the concept of proportionality was foremost among the principles underlying the framers' intent in adopting the eighth amendment.¹⁸¹

The two major moral theories of punishment, utilitarianism and right/retribution, both implicitly require proportionality in sentencing.¹⁸² Proportionality had its roots in early tenets of Western civilization. A significant portion of the Magna Carta was devoted to the proportionality of punishment to crime: "A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity" A primary purpose of the Declaration of Right was to reiterate the common law prohibition of disproportionate penalties.¹⁸³

The principal of proportionality requires both relative and absolute proportionality. Relative proportionality demands that serious crimes be punished more severely than lesser crimes and its corollary, that minor crimes be sanctioned less harshly than major offenses. One of the primary purposes of utilitarian proportionality is to induce a would-be

[No discretionary] state has made a legislative determination that forcible rape and murder can be deterred only by imposing the penalty of death upon all who perpetrate those offenses [I]t is clear that these sentences are "cruel" in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary.

Id. at 308-09 (Stewart, J., concurring).

180. Wheeler-II, *supra* note 34, at 72.

181. *Id.*

182. Rehabilitation does not contain an element of proportionality. The defendant is confined until rehabilitated, irrespective of the gravity or social harm of his offense. *See* Angel, *supra* note 24, at 80.

183. Wheeler-I, *supra* note 131, at 853. *See also* *Trop v. Dulles*, 356 U.S. at 100: "The phrase ['cruel and unusual punishment'] in our Constitution was taken directly from the English Declaration of Right of 1688, and the principle it represents can be traced back to the Magna Carta."

malfeasant to commit the least harmful crime. Because all rationally acting criminals employ act utilitarianism, a premise essential to deterrence theory,¹⁸⁴ there would be no inducement to refrain from serious offenses if their penalties were no greater than those meted out for lesser crimes. Furthermore, "striking fear into the hearts of all citizens with spectacular punishments for petty crimes may effectively deter crime, but the deterioration of law and social fabric which might follow is a limiting factor."¹⁸⁵ *Weems v. United States*¹⁸⁶ may be explained along the lines of proportionality among crimes and punishments. There, the Supreme Court vacated a sentence of *cadena temporal*—twelve years at hard labor wearing chains and permanent loss of civil rights—for falsifying government ledger books. The Court found that greater offenses received less harsh punishments.

The second requirement of proportionality is that a punishment must be proportionate to the offense in some absolute measure; it should not cause more suffering than the crime itself unchecked. Professor Hart relates that both Bentham and Blackstone questioned the usefulness of this aspect of proportionality as a guide to sentencing. How was one to measure wickedness or suffering, to enable commensurability, in the absence of quantitative units of either?¹⁸⁷ However, it is this aspect of proportionality which has been stressed in the post-*Gregg* cases.

VIII. MANDATORY DEATH PENALTY CASES: *WOODSON & ROBERTS*

*Woodson v. North Carolina*¹⁸⁸ and *Roberts v. Louisiana*¹⁸⁹ rejected mandatory death sentencing schemes as unconstitutional on three grounds: One, contemporary standards of decency were opposed to them; two, they invited jury nullification; and three, they failed to allow for individualization in sentencing. As to the objective indicators of public morality,¹⁹⁰ the pluralities noted that prior to *Furman* the trend among the states was to replace mandatory sentencing schemes with discretionary procedures. The several legislative responses to the reestablishment of mandatory sentencing by *Furman* were explained away as a misguided attempt to comply with the unclear requirements of *Furman*, "rather than a renewed societal acceptance of mandatory

184. *Accord*, *Gregg v. Georgia*, 428 U.S. at 183-86. *But see* text accompanying note 136 *supra*.

185. *Wheeler-I*, *supra* note 131, at 847-48.

186. 217 U.S. 349 (1910).

187. H. HART, PUNISHMENT AND ELIMINATION, 3-4(1968).

188. 428 U.S. 280 (1976).

189. 428 U.S. 325 (1976).

190. *See* notes 75-131 *supra* and accompanying text.

death sentencing.”¹⁹¹ The pluralities found further evidence of the evolving standards of decency in that sentencing juries were frequently reluctant to convict persons of capital crimes in mandatory jurisdictions.¹⁹²

This response by juries also created the second deficiency with respect to mandatory sentencing. The resultant jury nullification¹⁹³ would inevitably occur without legislatively created standards.¹⁹⁴ The discretion afforded to juries allowed them to return lesser non-capital verdicts. The pluralities found that this discretion was without legislatively defined standards. “Every jury in a first-degree murder case is instructed on the crimes of second-degree murder and manslaughter and permitted to consider those verdicts even if there is not a scintilla of evidence to support the lesser verdicts.”¹⁹⁵ Thus, in an indirect way, the capital sentencing procedures in *Woodson* and *Roberts* had the potential for the same arbitrary and wonton exercise of jury discretion as the statute struck down in *Furman*.

The pluralities in *Woodson* and *Roberts* seem to have employed the analytic approach in this analysis by relying almost exclusively on a procedural due process argument. Thus, the discretion found available in standardless verdict procedures required the vacating of sentences despite the fact that those procedures may not have been “excessive” in the accepted sense.¹⁹⁶

However, reliance on *Furman* for support is not strictly accurate. In *Furman*, Justices Stewart and White found the death sentences under the challenged statutes to be excessive because they were beyond “the punishments that the state legislatures have determined to be necessary.”¹⁹⁷ Because Georgia chose not to impose mandatory sentences on convicted murderers, the legislature had indicated that the purposes of its criminal justice system could be fulfilled by lesser sentences. “[The] legislative will is not frustrated if the penalty is never imposed.”¹⁹⁸ Consequently, the death penalty in *Furman* was the unnecessary inflic-

191. *Woodson v. North Carolina*, 428 U.S. at 298 n.34.

192. *Id.* at 293-94; *Roberts v. Louisiana*, 428 U.S. at 335.

193. See notes 122-31 *supra* and accompanying text.

194. 428 U.S. at 302-03; 428 U.S. at 334-35.

195. 428 U.S. at 334.

196. See also Justice Rehnquist's dissent in *Woodson v. North Carolina*, 428 U.S. at 324: What the plurality opinion has actually done is to import into the Due Process Clause of the Fourteenth Amendment what it conceives to be desirable procedural guarantees where the punishment of death, concededly not cruel and unusual for the crime of which the defendant was convicted, is to be imposed.

197. 408 U.S. at 309 (Stewart, J., concurring).

198. *Id.* at 311 (White, J., concurring).

tion of pain only because the discretionary sentencing procedure showed that the legislature felt death to be unnecessary.

The stated purposes of punishment were different under the Louisiana and North Carolina schemes. Those legislatures, by enacting mandatory legislation, manifested an intent that could be met only by a death sentence in each case. Under this analysis, capital punishment would not be the unnecessary infliction of pain; capital punishment would be necessary in order to effectuate state policy.¹⁹⁹

An alternative analysis might suggest that the pluralities thought the prospect of jury nullification diminished the deterrent effect of capital punishment. Under this theory, the legislature would be unable to justify the harsh sentence of death. But this approach would be contrary to the normal deference to legislative findings of deterrence employed in *Gregg*. Furthermore, the dissenters in *Woodson* and *Roberts* were unwilling to accept the likelihood of a widespread disregard of the jurors' duties. Those Justices suggested that mandatory sentencing schemes were superior in deterrence and retribution.

The discretion found available to juries in *Woodson* and *Roberts* also prevented meaningful judicial review, as required by the Court in *Gregg*. This required review serves to articulate standards for sentencing in capital cases. Therefore, the Court held in *Woodson* and *Roberts* that, at the very least, each statute should provide for automatic review of each capital sentence in order to standardize sentences and help ensure the constitutional application of required standards.²⁰⁰ The Court in *Gregg* praised the Georgia review procedure,²⁰¹ which ostensibly enabled the state supreme court to ensure regularity in capital sentencing.²⁰² For example, infrequent death sentences would be analyzed to determine whether they indicated a general advance in community morality or merely selectivity in meting out those ultimate punishments.

But this review scheme would provide the highest state court with evidence of public sentiment only if the appeal process allowed the reviewing court to analyze trends in *all* capital cases. The problem with the Georgia procedure is that only those capital cases resulting in death sentences are insured of reaching the state supreme court. The frequency or circumstances of cases in which lesser sentences of imprisonment are imposed might escape review altogether.²⁰³

199. 428 U.S. at 337 (White, J., dissenting).

200. See also *Capital Punishment*, *supra* note 94, at 288.

201. This review scheme is found in GA. CODE ANN. § 27-2537 (1977).

202. *Gregg v. Georgia*, 428 U.S. at 204-06.

203. *Id.* at 205-06. Pursuant to GA. CODE ANN. § 27-2537, the Georgia Supreme Court is

The third ground for rejecting mandatory sentences was their failure to allow for individualization in sentencing.²⁰⁴ This demand can be seen as an extension of *Witherspoon v. Illinois*,²⁰⁵ which requires that community values be considered in each capital case through the medium of jury leniency.

Individualization is also an aspect of the proportionality requirement; the moral wickedness of the crime should be relative to the character of the defendant.²⁰⁶ Therefore, in some cases a sentence of death might exceed the harm caused society by the offense.²⁰⁷

Particularized consideration of each defendant is also a required element of substantive due process analysis.²⁰⁸ Individualization demands a close nexus between the purpose of the criminal law and the punishment in each case. This is in essence a "least restrictive alternative" attack on capital sentencing. It follows Professor Tribe's concept of "structural due process"²⁰⁹ with ad hoc determinations that the substantive state interest will be furthered in each case.²¹⁰

IX. PER SE CHALLENGE TO THE DEATH PENALTY FOR RAPE: *COKER V. GEORGIA*

In *Coker v. Georgia*,²¹¹ the Court did not decide whether the death penalty for rape "measurably serve[d] the legitimate ends of punish-

to compare the death sentence under review to sentences of other like cases. "The court shall include in its decision a reference to those similar cases which it took into consideration." *Id.*

There may be some uncertainty in the genuineness or thoroughness of this review. In *Floyd v. State*, 210 S.E.2d 810 (Ga. 1974), the death penalty for robbery was vacated because it had been rarely imposed. But in all four "similar" robbery cases cited by the Georgia Supreme Court, the death penalty had been imposed. *Id.* at 814. In *Coley v. State*, 204 S.E.2d 612 (Ga. 1974), the death penalty for rape was vacated as rarely imposed. The court reviewed eleven cases, five of which resulted in the imposition of the death penalty. Yet soon afterwards, in *Eberhart v. State*, 206 S.E.2d 12 (Ga. 1974), the court upheld a capital sentence for rape.

Thus, this review process which the U.S. Supreme Court felt would keep a check on arbitrary jury action and insure uniformity in sentencing may not be achieving the desired result.

204. *Woodson v. North Carolina*, 428 U.S. at 303; *Roberts v. Louisiana*, 428 U.S. at 333.
205. 391 U.S. 510 (1967).

206. Culpability requires a showing of mens rea and establishes the degree of moral blameworthiness. Angel, *supra* note 24, at 76-80.

207. This might be true even if the crime involved the murder of a police officer as in *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 636-37 (1977) (per curiam).

208. Angel, *supra* note 24, at 133.

209. Tribe, *supra* note 127.

210. *Id.* at 286.

211. 433 U.S. 584 (1977).

ment,”²¹² as was implicit in *Gregg*. Rather, the Court determined the penalty to be “disproportional,” both relatively and absolutely, and therefore “excessive.” First, the penalty allowed a death sentence for an offense when the victim survived, yet it permitted mere imprisonment when the victim died. In Georgia, as in all other states,²¹³ a first-degree murderer may receive a sentence of imprisonment rather than death even when the homicide is attendant with aggravating circumstances. To execute a rapist, when he has not killed his victim, would result in relative disproportionality among sentences. Implicit in this holding²¹⁴ is the notion that the offense of rape is never as morally evil²¹⁵ as murder. It also suggests that no non-homicide crime may be punished with the death sentence, particularly in light of Justice White’s observation that “Short of homicide, [rape] is the ‘ultimate violation of self.’”²¹⁶ Apparently, other crimes which once warranted execution may now be punishable only by lesser sentences.²¹⁷ This attribute of the moral judgment expressed in *Coker* caused Justice Powell to dissent, in part, because he could not accede to such “a bright line between murder and all rapes—regardless of the degree of brutality of the rape or the effect upon the victim.”²¹⁸

The other aspect of disproportionality in *Coker*, that of absolute disproportionality, was the basis for the widespread legislative rejection of the death penalty for rape.²¹⁹ At the time of the decision, Georgia was apparently the only jurisdiction in the United States which validly authorized capital punishment for rape of an adult woman.²²⁰ Furthermore, only about ten percent of rape convictions in Georgia since 1973 had resulted in death sentences.²²¹ Thus, at least two of the crucial

212. *Id.* at 592-93.

213. See the mandatory death penalty cases, notes 188-210 *supra* and accompanying text.

214. *Coker v. Georgia*, 433 U.S. at 600.

215. For an analysis of moral wickedness, see H. HART, *supra* note 141, at 230-37.

216. 433 U.S. at 597.

217. For example, robbery and kidnapping can be punished only by sentences lesser than death. See *Gregg v. State*, 210 S.E.2d 659 (Ga. 1974). Former Justice Goldberg, relying on *Weems*, advocated this result. Goldberg, *The Death Penalty and the Supreme Court*, 15 ARIZ. L. REV. 355, 364 (1973).

218. 433 U.S. at 603.

219. *Id.* at 594-96.

220. North Carolina and Louisiana had also sought to impose the death penalty for rape, but their mandatory sentencing laws were held unconstitutional in *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976). However, as Chief Justice Burger correctly notes, even an unconstitutional statute may be reflective of public opinion. See *Coker v. Georgia*, 433 U.S. at 613.

221. 433 U.S. at 596-97.

indicators of "standards of decency," legislative enactments and jury action, pointed away from capital sentencing in rape cases. The Court concluded, therefore, that this sentence was disproportional to the severity of the crime as perceived by prevailing public attitudes.

The death penalty in *Coker* was found absolutely disproportional because popular sentiment abhorred it.²²² Consequently, absolute proportionality was a function of the state of public morality:

The strongest evidence that a punishment is disproportionate to a crime is evidence of public antipathy for the punishment in general or for its application to a particular crime If juries were regularly refusing to convict men of a particular crime when cognizant of the statutory punishment, it would be absurd to contend that the punishment is proportional to the crime.²²³

However, the "popular sentiment" analysis does not exhaust the proportionality principle. A punishment may be disproportional in spite of public acceptance.²²⁴ Even the dissenters in *Coker* seemingly accepted an eighth amendment proportionality bar to the death penalty for minor crimes²²⁵ without subsuming it to a popularity test.²²⁶ For the Justices to acknowledge that disproportionality might be proven in ways other than by demonstrating public abhorance inevitably embroils the Court in subjective analyses. At the very least, the line between major and minor crimes requires subjective delineation itself.²²⁷ To avoid this, the plurality in *Coker* stated that their own judgments, which were far from irrelevant, were supported by legislative rejection of capital punishment for rape.²²⁸

Coker clearly establishes the distinction between deferring to a particular legislative penalty scheme and deference to attitudes on punishment extant in the society as a whole.²²⁹ But what once seemed classic deference, pursuant to notions of federalism and institutional competence, has given way to consensual deference. For instance, in *Gregg*,

222. See also *Furman v. Georgia*, 408 U.S. 238, 332 (1972).

223. *Wheeler-II*, *supra* note 34, at 64.

224. *Id.*

225. 433 U.S. at 604.

226. In his Senate confirmation hearings, Justice Blackmun posed a hypothetical jaywalking statute carrying the death penalty; a statute which a court would have to strike down on independent proportionality grounds. *Hearings of the Senate Judiciary Committee on Nomination of Harry L. Blackmun to be Associate Justice of the Supreme Court of the United States*, 91st Cong., 2d Sess. 60 (1970).

227. *Coker*, 433 U.S. at 619-21. It would appear that to the dissenters in *Coker*, once any legislature has established capital punishment for a crime, it is placed outside the category of preposterous punishments requiring a proportionality analysis. *Id.*

228. *Id.* at 597.

229. See notes 84 & 85 *supra* and accompanying text.

Justice Stewart deferred to the Georgia Legislature on the issues of deterrence and moral standards: "The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies *in terms of their own local conditions*" ²³⁰ Yet, in *Coker*, Justice White, with Justice Stewart joining, discounted the possible deterrent effect of execution for rape by basing the decision on proportionality grounds. ²³¹

Far more important, however, is the retreat from the judicial method which allows each state to assess its own moral standards. ²³² The Court in *Gregg* emphasized "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" ²³³ *Coker* certainly expands the field for determination of social mores to the nation as a whole. ²³⁴ The Supreme Court has said that standards of decency in Georgia have not "evolved" to the level of the rest of the country nor, perhaps, to the rest of the civilized world. ²³⁵

The Court's role in proportionality assessment seems greater after *Coker*. For example, in *Furman*, Justice Powell suggested that the constitutional requirement of proportionality would only authorize the Court to strike down punishments as excessive in extraordinary cases. ²³⁶ *Coker* seemed to signal an expanded role for the Court, or at least a stricter interpretation of the proportionality requirement. The capital punishment methodology which prevailed in *Coker* was more in line with the early eighth amendment decisions than were the other recent capital cases. *Coker* establishes that standards of punishment are not tied to historical use. The death penalty for rape was widely authorized at one time but is now rejected through an evolution of moral standards. This suggests a progressive relaxation of punish-

230. *Gregg v. Georgia*, 428 U.S. at 186 (emphasis added).

231. 433 U.S. at 592 & n.4.

232. See Chief Justice Burger's dissent in *Coker*: "[T]he deference we owe to decisions of the state legislature under our federal system . . . is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'" 433 U.S. at 613 n.8 (emphasis in original).

233. 428 U.S. at 186-87.

234. Consequently, analysis of contemporary social values under the eighth amendment differs from such analysis under the first amendment in obscenity cases, where local standards of morality are deemed the controlling factor. *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Miller v. California*, 413 U.S. 15 (1973). The better rule is to establish a national standard in all such areas. Perry, *supra* note 40, at 732 n.201.

235. The plurality opinion in *Coker* notes that international sentiment was against capital punishment for rape. 433 U.S. at 596 n.201.

236. 408 U.S. at 458. See also note 226 *supra*.

ments, precisely the principle the framers intended with the eighth amendment.²³⁷

X. MITIGATING FACTORS: *LOCKETT V. OHIO*

The uncertain requirements of the eighth amendment which evolved from the nine separate opinions in *Furman* have recently caused yet another sentencing scheme to come under constitutional scrutiny. In *Lockett v. Ohio*²³⁸ and *Bell v. Ohio*,²³⁹ the Supreme Court overturned Ohio's death penalty on the ground that certain mitigating factors could not be introduced by the defendant.

[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital cases, not be precluded from considering *as a mitigating factor*, any aspect of defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.²⁴⁰

In the leading case, Sandra Lockett, a twenty year old woman, was an accomplice to an armed robbery²⁴¹ in which a shopkeeper was accidentally shot. She was the driver of the getaway car and took no part in the actual killing. Her participation was described as minimal,²⁴² but she was found vicariously liable under Ohio's complicity statute.²⁴³ The man who did the actual killing pleaded guilty to murder and became the state's principal witness against Lockett. The state then reduced charges against him, thereby removing the possibility of his receiving the death penalty. Lockett refused three offers to plead guilty to lesser offenses and was subsequently convicted of murder with aggravating circumstances and sentenced to death.

237. This raises the question of whether standards of decency may regress, or whether the eighth amendment permits only a liberalization of punishments. It would seem very difficult for the Supreme Court to ever authorize a reinstatement of a penalty once prohibited on the grounds of "cruel and unusual." The plurality in *Gregg* suggests that a ruling of unconstitutionality under the eighth amendment could never be reversed short of constitutional amendment. 428 U.S. at 176. This is probably true, but it is suggested elsewhere that only that level of public support sufficient to result in a constitutional amendment is relevant in determining public sentiment. See note 111 *supra* and accompanying text. But see note 203 *supra*.

238. 98 S. Ct. 2954 (1978).

239. 98 S. Ct. 2977 (1978).

240. *Lockett v. Ohio*, 98 S. Ct. at 2965 (emphasis in original; footnotes omitted).

241. The gun was actually obtained from the pawn shop owner under the pretext of a purchase. *Id.* at 2957.

242. The presentence report indicated that "Lockett had not followed [orders] to keep the car running during the robbery and instead had gone to get something to eat." *Id.* at 2959 n.2.

243. OHIO REV. CODE ANN. § 2923.03(A),(F) (Page 1975).

The Ohio sentencing statute required the trial judge to impose a judgment of death after a verdict of "aggravated murder with specifications," unless at least one of three mitigating circumstances were found: provocation by the victim, coercion, or mental deficiency.²⁴⁴ The defendant was unable to introduce evidence on his or her character, youthfulness, previous record, degree of participation in the crime, or other individualizing criteria.

Justices White and Rehnquist, in separate opinions, viewed the case as a complete "about-face"²⁴⁵ from *Furman*. *Lockett* returned to the jury the discretion to consider any relevant mitigating factor.²⁴⁶ To avoid conflict with *Furman*, the Court stressed that this discretion must be "directed and limited," but not eliminated.²⁴⁷

Despite Chief Justice Burger's efforts in the plurality opinion to fully reconcile *Lockett* with *Furman* and the mandatory cases, there is no real consistency. Three Justices, Stewart, White, and Douglas, used an analytic attack in *Furman* to void capital statutes then existing, stating that eighth amendment due process surely was being frustrated by inherently discriminatory death sentences. Only Justice Stewart, one of the eight sitting in *Furman* and *Lockett*, could find similar procedural deficiencies in both these cases.²⁴⁸

Lockett marks a mere seven years of eighth amendment death penalty challenges. It is a disguised exercise of stricter judicial review of capital legislation. The Court has recognized that the legislatures are not acting within the constitutional standards which they themselves have partly defined as a result of the Court's judicial deference.

The various analyses employed by Chief Justice Burger and Justices Blackmun and White reflect disappointment with legislative responsibility. The Chief Justice's plurality opinion considered the Ohio sentencing scheme an extension of the mandatory legislation previously ruled unconstitutional.²⁴⁹ Thus, the requirement for individualization in capital cases was only partially realized by a statute which precluded many types of mitigating circumstances. *Lockett*'s death sentence may have been disproportional to her offense because it failed to consider

244. *Id.* § 2929.03.

245. 98 S. Ct. at 2982 (1978) (White J., dissenting in part). Justice Rehnquist felt the Court had "gone from pillar to post." *Id.* at 2973 (Rehnquist, J., dissenting).

246. *Id.* at 2967.

247. *Id.* at 2963 (relying on *Gregg v. Georgia*, 428 U.S. 153 (1976)).

248. Justice Brennan did not participate in *Lockett*, but his view is well settled and there is nothing to suggest any shift in his position here. Justice Douglas has been replaced by Justice Stevens.

249. See text accompanying notes 188-98 *supra*.

her intent and minimum participation in the crime.²⁵⁰

Surely every capital defendant could proffer mitigating evidence of some sort, even one for whom mandatory sentences may still be constitutional.²⁵¹ Nonetheless, only that evidence which is legally relevant would be permissible. This might yield a boot-strapping process. Pursuant to *Lockett* the jury must consider all evidence relevant to assessment of the appropriate penalty. But the legislature, prior to *Lockett*, defined the terms of relevancy. Thus, *Lockett* requires complete sentencing discretion where capital punishment is validly authorized, perhaps limited only by notions of equal protection. Justice Rehnquist accurately described the inevitable effect. "[T]he new constitutional doctrine will not eliminate arbitrariness or freakishness in the imposition of sentences, but will codify and institutionalize it."²⁵² This does not undermine the result in *Lockett*; instead it again demonstrates that arbitrariness is inherent in capital sentencing.²⁵³

Justice Blackmun voted to reverse for two reasons. First, he felt that the sentencing body was constitutionally required to consider the defendant's involvement, "or the degree of her *mens rea*."²⁵⁴ But he was not as yet willing to require consideration of other types of mitigating evidence. Justice Blackmun could not draw "a convincing bright-line" with respect to vicarious liability, as had been done in rape cases,²⁵⁵ so as to preclude the death penalty for felony murder altogether. Instead, he adopted "a proceduralist tack,"²⁵⁶ an approach he felt would interfere less severely with the legislatures' discretion. But by rejecting a proportionality analysis and adopting an analytic approach, Justice Blackmun may have opened the door for greater judicial participation in sentencing standards than he had previously stated was desirable. This ground for reversal is certainly contrary to his vote in the mandatory cases following *Gregg*.²⁵⁷ He may have felt compelled to reach this result due to the unconscionable nature of this case. But the

250. The plurality opinion reserved judgment on the validity of capital punishment for vicarious liability. But see Justice White's concurring opinion in text accompanying notes 262-65 *infra*.

251. The Supreme Court has specifically avoided ruling on whether mandatory death sentences are constitutional in cases such as murder committed by an escaped prisoner under life sentence. *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 637 n.5 (1977) (per curiam).

252. *Lockett v. Ohio*, 98 S. Ct. at 2975.

253. H. BEDAU, *supra* note 75.

254. 98 S. Ct. at 2969.

255. *Coker v. Georgia*, 433 U.S. 584 (1977).

256. 98 S. Ct. at 2970.

257. *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977) (per curiam); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

limits Justice Blackmun imposes here are devoid of standards and thus are not capable of application elsewhere. For example, he does not explain why the degrees of participation and *mens rea* are crucial mitigating criteria while other elements of defendant's character might not be. If Justice Blackmun intends to "interfere with the legislative judgment of the States"²⁵⁸ only on a case-by-case basis, he certainly embroils the Court in greater subjective review of death penalty legislation and provides lesser guidance for the constitutional exercise of legislative discretion.

Justice Blackmun's second stated ground for reversal was the unconstitutional burden placed upon the defendant's sixth amendment right to jury trial and fifth amendment right to plead not guilty.²⁵⁹ "Under Ohio Rule Crim. Proc. 11(C)(4), the sentencing court has full discretion to prevent imposition of a capital sentence 'in the interests of justice' if a defendant pleads guilty or no contest, but wholly lacks such discretion if the defendant goes to trial."²⁶⁰

Thus, Justice Blackmun employed an analytic approach in arriving at both of his objections in *Lockett*. This avoids direct confrontation with legislative discretion in a particular case, as does procedural due process methodology in general.²⁶¹ But the net effect seems contrary to Justice Blackmun's earlier highly deferential approach.

Justice White dissented from the plurality opinion but concurred in the judgment. He adhered to his view that mandatory sentencing does not violate the eighth amendment²⁶² and forecast a "return to the pre-*Furman* days when the death penalty was generally reserved for those very few for whom society has least consideration."²⁶³ Nonetheless, he voted to reverse on the ground that a death sentence for homicide not purposefully caused was excessive. Justice White found the death sentence disproportional because its infrequent application prevented it from furthering the goals of punishment.²⁶⁴ "It is clear from recent history that the infliction of death under circumstances where there is

258. 98 S. Ct. at 2970.

259. *Id.* (citing *United States v. Jackson*, 390 U.S. 570 (1968)).

260. *Id.* at 2971.

261. See Angel, *supra* note 24, at 65; Goldberg & Dershowitz, *supra* note 26, at 1800 ("The assumption seems to be that it is more appropriate for the Court to invoke the Constitution to interfere with a government's choice of procedures than to interfere with its enactment of substantive criminal law.").

262. *Roberts v. Louisiana*, 428 U.S. 325, 349 (1977) (White, J., dissenting). *Roberts* also involved the felony-murder rule.

263. 98 S. Ct. at 2983.

264. Of the 362 executions since 1954 that Justice White surveyed, he found that only eight "clearly involved individuals who did not personally commit the murder." *Id.* at 2983.

no purpose to take life has been widely rejected as grossly out of proportion to the seriousness of the crime."²⁶⁵

This analysis is facially consistent with his opinion in *Furman*, where he found that arbitrary and infrequent imposition of death sentences failed to satisfy legitimate state goals. But in *Furman*, it was not the infrequency of imposition alone that raised eighth amendment problems,²⁶⁶ it was the legislative acquiescence in that practice which indicated that executions were unnecessary to fulfill the legislatures' stated purposes.²⁶⁷

What seems to emerge as Justice White's primary objection to the Ohio scheme is the lack of value that capital punishment has in cases of unintentional homicide. Capital punishment in such cases is unnecessary and excessive because its deterrent effect is "extremely attenuated."²⁶⁸ Justice White stated that, "Whatever questions may be raised concerning the efficacy of the death penalty as a deterrent to intentional murders - and that debate rages on - its function in deterring individuals from becoming involved in ventures in which death may unintentionally result is even more doubtful."²⁶⁹ This analysis seems intuitively correct.²⁷⁰ However, a rule turning on the intention of the defendant creates definitional issues which the rest of the Court was unwilling to share.²⁷¹ It also suggests that the death penalty would be unconstitutionally severe as to any other class of murder where the deterrent effect on the defendant is minimal.²⁷²

A separate ground for vacating petitioner's death sentence was passed over by the Court. Petitioner had challenged the validity of her conviction on the ground that four veniremen who had revealed scruples against the death penalty were excused for cause in violation of *Witherspoon v. Illinois*.²⁷³ The Supreme Court dismissed this challenge because "nothing in [*Witherspoon*] prevented the execution of a

265. *Id.* at 2983-84.

266. Indeed, there Justice White stated that proportionality requirements are not necessarily violated "no matter how infrequently those convicted of rape or murder are executed" *Furman v. Georgia*, 408 U.S. at 311.

267. *Id.* at 314. Those legislatures responding to *Furman* with mandatory sentencing manifested a state purpose (deterrence and retribution) which could only be satisfied by consistent imposition of death sentences.

268. *Lockett v. Ohio*, 98 S. Ct. at 2984.

269. *Id.*

270. Justice White previously used intuition in setting constitutional standards in *Furman*, but there he used it to show that capital punishment was not per se unconstitutional. *Furman*, 408 U.S. at 310 (White, J., concurring).

271. 98 S. Ct. at 2970 (Blackmun, J., concurring).

272. See note 115 *supra*.

273. 391 U.S. 510 (1968).

death sentence when the veniremen excluded for cause make it 'unmistakably clear . . . that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.'"²⁷⁴ The Ohio sentencing scheme vested the trial judge, not the jury, with responsibility to decide upon death or a lesser sentence. Consequently, the only way that a juror who found the death sentence reprehensible could contribute his "standard of decency" would be to vote for acquittal in spite of the "law and instruction of the trial judge."²⁷⁵

If Ohio had a properly constituted capital statute which afforded the jury "directed and limited"²⁷⁶ sentencing discretion, the four excluded jurors could have conscientiously joined the venire; in that case, their exclusion would have directly violated *Witherspoon*. As a result, Lockett almost certainly would have received a life sentence instead of death.

The holdings of *Lockett* and *Witherspoon*, when read together, suggest that the principles of discretion require jury sentencing in all cases. *Lockett* also seems to severely limit *Proffitt v. Florida*²⁷⁷ and *Jurek v. Texas*,²⁷⁸ companion cases to *Gregg*. In *Proffitt*, the Supreme Court upheld a sentencing scheme which allowed the jury to consider only limited, enumerated mitigating circumstances. However, the Court construed the sentencing statute to allow any relevant mitigating evidence.²⁷⁹ On the other hand, the statute found acceptable in *Jurek* looks very much like the one recently rejected in *Lockett*.²⁸⁰ Now, evidently, the Supreme Court is not as willing to accept state courts' interpretations as a cure for capital statutes with limited or enumerated mitigating factors.

XI. CONCLUSION

Eighth amendment challenges to the death penalty have an inconsistent history and a more uncertain future. In this decade the Supreme

274. 98 S. Ct. at 2960 (quoting *Coker v. Georgia*, 433 U.S. 584 (1977)).

275. *Id.* The Court understandably disapproves of such action in *Lockett* but has acknowledged the relevance of jury nullification as an indicator of evolving standards. See *Coker v. Georgia*, 433 U.S. 584 (1977) (jury decision useful in assessing whether capital punishment is appropriate in a particular case).

276. 98 S. Ct. at 2963.

277. 428 U.S. 242 (1976).

278. 428 U.S. 262 (1976).

279. 428 U.S. at 257-58.

280. 428 U.S. at 269.

Court has meandered through six major attempts at enunciating standards for capital punishment. The several disparate attitudes toward judicial review in general and the nontextually based constitutional guarantee of humane punishments in particular have rendered a coherent and consistent standard difficult to obtain.

Prior to *Furman v. Georgia*, there had not been an elaborate field of eighth amendment decisions upon which the Court could build a principled approach to sentencing standards. The two major cases which attempted to set standards for "cruel and unusual"²⁸¹ involved lesser punishments than death and had assumed, arguendo, the constitutionality of capital punishment. The Framers' command for humane punishments was so elusive that few Supreme Court Justices have been willing to directly establish or define eighth amendment standards.

In *McGuatha v. California*, the first of the modern-day capital cases, the Court found standardless capital sentencing procedures consistent with due process. Soon thereafter, in *Furman*, three Justices avoided an otherwise direct eighth amendment challenge to the death penalty by again focusing on sentencing procedures. In *Gregg v. Georgia*, a majority of the Supreme Court, for the first time, addressed the validity of a judgment of death under the eighth amendment.

The approach which has emerged from these cases places the Court in a reduced role of constitutional interpretation. The opinions have displayed judicial reticence in directly defining a prohibition which inevitably must find standards outside of the Constitution. Using the "evolving standards of decency" to determine the meaning of "cruel and unusual" insures that no punishment which is clearly repugnant to the overwhelming portion of society will survive. But by tying the constitutional norm to elusive social values, the Court has institutionalized a great and devious controversy. Democratic majoritarianism is preserved by the Court's professed deference; but it is preserved in an area where the Court has historically been less inclined to accept legislative determinations.

By borrowing the scope of judicial review employed in the equal protection area, which is not foreign to the jurisprudence involved here,²⁸² the Court could reasonably require a greater showing of governmental need for the death penalty. The burden of proof regarding the utility of a punishment should rest with the state where fundamental constitu-

281. *Trop v. Dulles*, 356 U.S. 86 (1958); *Weems v. United States*, 217 U.S. 349 (1910).

282. Note, *Gregg v. Georgia, Proffitt v. Florida, and Jurek v. Texas: Burden of Proof in Capital Cases Past, Present, and Future*, 6 CAP. U.L. REV. 155, 157 (1976) [hereinafter cited as *Burden of Proof*]. See also notes 23 & 115 *supra*.

tional rights are concerned. However, the Supreme Court has never held that the right not to be executed is fundamental for eighth amendment purposes. To be sure, no one may be deprived of life without due process of law; therefore, the right to life is fundamental for fifth and fourteenth amendment due process purposes. But the fundamental right protected in the eighth amendment is the right to suffer no cruel and unusual punishments. Thus, penalty legislation is entitled to the same presumption of validity as other areas of economic and social regulation. Only when a penalty is determined to be "cruel and unusual" must a state show a special need for its exaction.²⁸³

It is certainly not accurate to accuse the Court of employing a bootstrapping analysis—that the mere existence of a death statute is evidence of the constitutionality of capital punishment—for sentences have been stricken notwithstanding this deference. Yet in the eighth amendment area, the Court employs a mode of analysis with few contemporary counterparts.

The presumed deterrent effect of capital punishment is essential to its continued validity; contemporary standards of decency would seemingly eschew any severe punishment without superior social effect. Yet the objective indicia of social morality which define "cruel and unusual" punishments do not appear to take this factor into serious consideration. Furthermore, the battle of statistics between abolitionists and proponents was generated primarily in response to judicial inquiry, not because of legislative or popular demands.²⁸⁴

In *Furman* and *Gregg*, most members of the Court felt it inappropriate to assume a supervisory role in a field wrought with uncertainty and base emotion. Perhaps, if public and political trends in the 1970's had shown a liberalization of attitudes toward criminal punishment rather than a constriction, the Court might have displayed greater ethical leadership as it did in the abortion cases. But in *Roe v. Wade*, the Court seemingly responded to public morality by striking down restrictive state statutes. A similar effect in *Furman* or *Gregg* would have to have been based on a more independent concept of judicial review.

The cases following *Gregg*, including two of the mandatory cases decided the same day,²⁸⁵ provided the Court with a greater opportunity to define eighth amendment standards while leaving the state legislatures considerable discretion. These cases also evince an increased judicial leadership in setting ethical standards. This article has suggested that

283. *But see Burden of Proof*, *supra* note 282.

284. *See* note 163 *supra* and accompanying text.

285. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976). *See* part VIII, *supra*.

the Court should assume such a role, even to the extent of establishing first moral principles. The closest the Court has come to such principled rule making is in *Coker v. Georgia*, suggesting that non-homicide crimes may not be punished by death. But cases such as *Lockett v. Ohio* reinforce the need for further leadership.

In *Lockett*, the Court strained adherence to its narrow exceptions in eighth amendment adjudication. The plurality merely conceptualized the case as a peculiar form of mandatory legislation previously found unconstitutional. However, the Court did not, in fact, determine that contemporary notions of public decency abhorred a statute limiting mitigating factors for consideration in sentencing. What it did determine was that the death penalty for Sandra Lockett was plainly repugnant to maturing moral standards. That determination was made because executing Lockett would shock the conscience of virtually every member of the Court. In this respect, the Court's decision bears surprising resemblance to the earlier approaches of Justices Marshall and Brennan. However, the approach apparently taken in *Lockett* could be expanded beyond its current ad hoc application. When eight members²⁸⁶ of the Supreme Court are disturbed by a capital sentence, their vacating that sentence fulfills the intention of the eighth amendment proscriptions of inhumane punishments.

286. Justice Rehnquist was the only member of the Court voting to affirm the judgment of death in *Lockett*, 98 S. Ct. at 2973, and has voted for affirmance in each capital case. Justice Brennan did not participate in *Lockett*, but has expressed his view that the death penalty is unconstitutional per se. See note 248 *supra*.