3-1-1976

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Recommended Citation
Available at: https://digitalcommons.lmu.edu/lrlr/vol9/iss2/1
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THE PERSISTENCE OF DISCRETION

by Mary Ellen Gale*

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.¹

We must understand that crime is going to be with us forever . . . .²

I.

Much solemn nonsense has been written in the name of crime prevention, crime eradication, and the deterrence of criminals.³ But there is nothing more indicative of our social and legal confusion about the proper way to cope with the challenge of violent crime in a free society than the history of capital punishment in the United States. We have accepted it and rejected it and accepted it yet again.⁴ We have sought for new ways to impose it,⁵ and new reasons to withhold it.⁶ We

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3. See, e.g., Barzun, In Favor of Capital Punishment, in The Death Penalty in America 154 (H. Bedau ed. 1967) [hereinafter cited as Death Penalty in America]; Hoover, Statements in Favor of the Death Penalty, in Death Penalty in America, supra at 130. For Bedau's reply to Barzun see Bedau, Death as a Punishment, in Death Penalty in America, supra at 214-28. For a cogent criticism of Hoover's remarks and of the "confusion between the proposition that the death penalty deters and the proposition that it is appropriate," see Polsby, The Death of Capital Punishment? Furman v. Georgia, 1972 Supreme Court Rev. 1, 35-40.

4. See Cobin, Abolition and Restoration of the Death Penalty in Delaware, in Death Penalty in America, supra note 3, at 359; Dann, Abolition and Restoration of the Death Penalty in Oregon, in Death Penalty in America, supra note 3, at 343; Guillot, Abolition and Restoration of the Death Penalty in Missouri, in Death Penalty in America, supra note 3, at 351.


6. See People v. Anderson, 6 Cal. 3d 628, 645-51, 493 P.2d 880, 891-95, 100 Cal. Rptr. 152, 163-67, cert. denied, 406 U.S. 958 (1972) (length of time between pronounce-
have directed courts and juries to single out the wrongdoers most deserving of the ultimate sanction and, at the same time, expressed a profound and continuing distrust that they can or will do what we have told them to do.\(^7\)

The primary purpose of this article is to examine one of the newest and most complex schemes ever devised for inflicting capital punishment on those who transgress our most cherished prohibitions: the death penalty provisions included in Senate Bill 1, the Federal Criminal Justice Reform Act, as reported last fall to the Senate Committee on the Judiciary by its Subcommittee on Criminal Laws and Procedures.\(^8\)

The primary argument will be that this latest attempt to rationalize the death penalty, an attempt which plainly evidences hard work by its drafters, is nonetheless a failure. It does not succeed in its announced intent to compel courts and juries to act within narrowly defined limits in determining whether certain criminals convicted of certain crimes should suffer imprisonment or death. Still less does it point the way toward any alternative scheme of sentencing which might remove broad-ranging discretion from the factfinder's hands. The death penalty sections of S. 1 are proof, if proof was needed, that it is impossible to remove discretion from our legal system, even in the name of evenhanded justice.

II.

Nearly four years have passed since the Supreme Court of the United States, in the landmark decision of *Furman v. Georgia*,\(^9\) struck down the death penalty in the cases before it as cruel and unusual punishment forbidden by the eighth and fourteenth amendments.\(^10\) In the interim, thirty-seven of the forty\(^11\) states whose capital punishment statute of death sentence and actual execution is sufficient to constitute psychological cruelty and thus violates California constitution's prohibition against cruel or unusual punishment).


\(^8\) S. 1, 94th Cong., 1st Sess. §§ 2401-03, 3726 (Comm. Print Aug. 15, 1975) [hereinafter cited as S. 1].

\(^9\) 408 U.S. 238 (1972).

\(^10\) The selective incorporation process, by which specific guarantees of the Bill of Rights have been assimilated piecemeal into the fourteenth amendment, now unquestionably extends to the eighth amendment. Schilb v. Kuebel, 404 U.S. 357, 365 (1971) (excessive bail); see Robinson v. California, 370 U.S. 660, 666 (1962) (cruel and unusual punishment).

\(^11\) At the time *Furman v. Georgia* was decided, ten states had already abolished
utes were thereby or subsequently invalidated have moved to restore the death penalty in ways that allegedly do not violate the mandate of *Furman.* Although no federal case involving the death penalty has since been up for review by the Court, there seems to be little doubt that the pre-*Furman* death penalty provisions scattered throughout the United States Code are unconstitutional under the ruling in *Furman.*

The death penalty sections of S. 1 are not the first attempt to restore capital punishment to federal law. The Congress has already rejuvenated the death penalty. They were Alaska, California, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, and Wisconsin. See *Furman v. Georgia,* 408 U.S. 238, 385 n.7 (1972) (Burger, C.J., dissenting). California has since restored capital punishment through a referendum, approved by a 2-1 majority. N.Y. Times, Nov. 9, 1972, § 1, at 40, col. 3; see CAL. CONST. art. I, § 27. Thirty-six other states presently have provisions for capital punishment. 18 CRIM. L. REP. 2196 (Nov. 26, 1975).

12. See text accompanying and following note 20 infra.


14. The *Draft Committee Report* accompanying S. 1 lists ten federal capital crimes predating the *Furman* decision: 18 U.S.C. § 34 (1970) (destruction of motor vehicles or motor vehicle facilities where death results); id. § 351 (assassination or kidnaping of a member of Congress); id. § 794 (gathering or delivering defense information to aid a foreign government); id. § 1111 (murder in the first degree within the special maritime or territorial jurisdiction of the United States); id. § 1716 (causing death of another by mailing injurious articles); id. § 1751 (kidnaping and murder of President or Vice-President); id. § 2031 (rape within the special maritime or territorial jurisdiction of the United States); id. § 2381 (treason); 49 U.S.C. § 1472(i) (1970) (aircraft piracy). See III STAFF OF SENATE COMM. ON THE JUDICIARY, REPORT ON CRIMINAL JUSTICE CODIFICATION, REVISION, AND REFORM ACT OF 1974, 93d Cong., 2d Sess. 909 (Comm. Print undated) [hereinafter cited as DRAFT COMMITTEE REPORT]. Other federal crimes which carry a possible death sentence include 18 U.S.C. § 1992 (1970) (train wrecking resulting in death); id. § 2113(e) (bank robbery resulting in death or kidnaping). The federal kidnaping statute has been amended to remove the death penalty as a possible punishment. Id. § 1201(1), as amended, 18 U.S.C. § 1201 (Supp. II, 1972). This list does not include crimes punishable by death under the Uniform Code of Military Justice.
nated the death penalty in a narrow class of cases: those involving air hijacking or air piracy. The little-noticed but hotly debated Antihijacking Act of 1974 was a rewrite of the capital punishment provisions of the Nixon Administration's original version of S. 1. The death penalty sections of the Antihijacking Act do not differ significantly from those of S. 1; the arguments made in this article can readily be adapted to any constitutional challenge to that statute as well.

The five justices who constituted the *Furman* majority agreed only on a terse per curiam, of which the crucial sentence read:

The Court holds that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Courts and commentators necessarily directed their attention to the five separate concurring opinions, and the four separate and combined dissents, in an effort to determine what the Supreme Court had decreed. It was at once apparent that only Justices Brennan and Marshall had concluded that the death penalty was unconstitutional per se, in all circumstances, as cruel and unusual punishment banned by the eighth amendment.

Justice Douglas found only that "these discretionary statutes are unconstitutional in their operation." Because the statutes before him were "pregnant with discrimination" and discrimination had in fact occurred, they were not "compatible with the idea of equal protection

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17. Although the following argument is not framed in eighth amendment terminology, it is clear that *Furman*, at the very least, forbids discretionary statutes which result in the arbitrary and discriminatory application of the death penalty. Under a slightly more expansive reading, *Furman* prohibits any capital statute which is discretionary on its face, regardless of whether it leads to arbitrary or discriminatory results. Under a third reading, any discretion, even if not accorded by statute to the judge or the jury, in any part of the conviction or sentencing process, would be constitutionally fatal. *See* Comment, *The Supreme Judicial Court and the Death Penalty: The Effects of Judicial Choice on Legislative Options*, 54 B.U.L. Rev. 158, 162-66 (1974). "If what disturbed the [*Furman*] Court was the exercise of discretion, then a statute that is mandatory on its face but discretionary in its operation should not be a viable solution." *Id.* at 165.
18. 408 U.S. at 239-40 (emphasis added).
19. None of the concurring justices in *Furman* joined any other Justice's opinion.
20. All four dissenting Justices joined in the dissenting opinions of Chief Justice Burger and Justices Powell and Rehnquist. In addition, Justice Blackmun wrote a brief separate dissent.
21. 408 U.S. at 305 (Brennan, J., concurring); *id.* at 358-71 (Marshall, J., concurring).
22. *Id.* at 256-57 (Douglas, J., concurring).
23. *Id.* at 257, 249-52.
of the laws that is implicit in the ban on 'cruel and unusual' punishments." He specifically did not reach the question of whether a mandatory death penalty, imposed impartially on rich and poor and Black and White, would meet the constitutional commands.

Justice Stewart, expressly declining to rule on "[t]he constitutionality of capital punishment in the abstract," determined that the particular death sentences in question were unusual in that they were "among a capriciously selected random handful . . . wantonly and . . . freakishly imposed." Since none of the statutes required death as an "automatic punishment" for the crimes of which the defendants had been convicted, the death sentences exceeded the punishments the legislators had found "necessary" and were thus cruel as well as unusual. Justice White, observing that "statutes requiring the imposition of the death penalty . . . would present quite different issues under the Eighth Amendment," found that the statutes before him resulted in death sentences too seldom to serve any legitimate social purpose. White noted that under the sentencing schemes at issue, "the legislature [did] not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed) . . . ."

Chief Justice Burger's opinion, joined by the other three dissenters, pounced on the White and Stewart opinions as a guide to future death penalty legislation. Burger observed:

It is concluded that petitioners' sentences must be set aside, not because the punishment is impermissibly cruel, but because juries and judges have failed to exercise their sentencing discretion in acceptable fashion.

. . . . The decisive grievance of the opinions . . . is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice; the problem is not that too few have been sentenced to die, but that the selection process has followed no rational pattern . . . .

. . . . [I]t is clear that if state legislatures and the Congress wish to maintain the availability of capital punishment, significant statutory

24. Id. at 257.
25. Id.
26. Id. at 308, 309-10 (Stewart, J., concurring).
27. Id. at 308, 309.
28. Id. at 310, 311-12 (White, J., concurring) (emphasis added).
29. Id. at 311.
30. Id. at 397-98 (Burger, C.J., dissenting). The Chief Justice's comments generally are applicable to Justice Douglas's opinion as well.
changes will have to be made. Since the two pivotal concurring opinions turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, legislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed.\footnote{31}

III.

The drafters of the Judiciary Draft Committee Report on S. 1 relied heavily on the language quoted above\footnote{32} to support their conclusion that S. 1's capital punishment provisions and procedures "meet the requirements of the Supreme Court by providing rational criteria for the imposition of the death penalty which will prevent its use in an arbitrary and capricious manner."\footnote{33}

The report expressly rejected mandatory death penalties which would preclude the exercise of any discretion by the sentencing authority. Though such penalties might be authorized by Furman, the report found that they could not "withstand the test of humanity."\footnote{34} Instead, the drafters chose to establish criteria to serve as a guide in the discretionary imposition of the penalty, elaborating upon the standards originally adopted in the American Law Institute's Model Penal Code\footnote{35} and suggested as an alternative in the final report of the National Commission on Reform of Federal Criminal Laws.\footnote{36}

The Model Penal Code formulation, like S. 1, contains lists of "aggravating" and "mitigating" circumstances which the sentencing factfinder must consider and weigh in determining whether to sentence a potential capital offender to death.\footnote{37} Under the Model Penal Code, however, the sentencing body retains the discretion to reject the death penalty in any case before it, even if several of the aggravating and

\begin{itemize}
\item[31.] Id. at 398-99, 400 (citations omitted).
\item[32.] Draft Committee Report, supra note 14, at 910-11.
\item[33.] Id. at 911.
\item[34.] Id. at 918.
\item[35.] Model Penal Code, supra note 5, § 210.6.
\item[37.] Model Penal Code, supra note 5, § 210.6, provides in part:
\end{itemize}

The determination whether sentence of death shall be imposed shall be in the discretion of the Court. In exercising such discretion, the Court shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant but shall not impose sentence of death unless it finds one of the aggravating circumstances enumerated in Subsec-
none of the mitigating factors are present. The drafters of S. 1 sought to limit discretion further, observing that mere guidelines would not guarantee an end to the wanton and freakish results deplored by Justice Stewart, nor meet Justice White's objection to a system under which the "legislative will is not frustrated if the penalty is never imposed." As a result, S. 1 requires the death penalty if any one of the listed aggravating circumstances and none of the mitigating circumstances are present, but forbids the death penalty if any one of the mitigating circumstances is present (regardless of how many aggravating circumstances are also present). S. 1 thus combines ostensible standards

38. 408 U.S. at 311.
39. S. 1, supra note 8, § 2402(e); see DRAFT COMMITTEE REPORT, supra note 14, at 926. The aggravating and mitigating circumstances of S. 1 are contained in section 2401:

"(a) IN GENERAL.—Except as otherwise provided in subsection (b), a defendant who has been found guilty of a Class A felony under section 1101 (Treason), 1111 (Sabotage), 1121 (Espionage), or 1601 (Murder), shall be sentenced to death if:
with allegedly mandatory aspects in an attempt "to maximize fairness in

"(1) the offense is under section 1101 (Treason), 1111 (Sabotage), or 1121 (Espionage) and:

"(A) the defendant has been convicted of another offense involving treason, sabotage, or espionage, committed before the time of the offense, for which a sentence of life imprisonment or death was authorized by statute;

"(B) the defendant, in the commission of the offense, knowingly created a grave risk of substantial impairment of the national defense; or

"(C) the defendant, in the commission of the offense, knowingly created a grave risk of death to any person;

"(2) the offense is under section 1601 (Murder) and:

"(A) the defendant committed the offense during the commission of an offense described in section 1101 (Treason), 1111 (Sabotage), 1121 (Espionage), 1313(a)(1) (Escape), 1621 (Kidnapping), 1631 (Aircraft Hijacking), or 1701 (Arson);

"(B) the defendant has been convicted of another federal offense, or a state offense involving the death of a person, committed either before or at the time of the offense, for which a sentence of life imprisonment or death was authorized;

"(C) the defendant has previously been convicted of two or more federal or state felonies, committed on different occasions before the time of the offense, involving the infliction of serious bodily injury upon another person;

"(D) the defendant, in the commission of the offense, knowingly created a grave risk of death to another person in addition to the victim of the offense;

"(E) the defendant committed the offense in an especially heinous, cruel, or depraved manner;

"(F) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value;

"(G) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value; or

"(H) the defendant committed the offense against:

"(i) the President, or a potential successor to the presidency as defined in section 1359(a)(1)(C);

"(ii) the chief of state or head of government, or the political equivalent, of a foreign power;

"(iii) a foreign dignitary who is in the United States on official business;

"(iv) a federal public servant who is a United States official, a law enforcement officer, or an employee of an official detention facility; or who is outside the United States for the purpose of performing diplomatic duties or other official duties relating to the functions of an embassy or consular post of the United States; and who is killed while engaged in the performance of his official duties, or because of an official action taken or to be taken or a legal duty performed or to be performed by him, or because of his status as a public servant.

"(b) IMPOSITION PRECLUDED.—Notwithstanding the existence of one or more of the factors set forth in subsection (a)(1) or (a)(2), the court shall not sentence the defendant to death if, at the time of the offense:

"(1) the defendant was less than eighteen years old;

"(2) the defendant's mental capacity was significantly impaired, although not so impaired as to constitute a defense to prosecution;

"(3) the defendant was under unusual and substantial duress, although not such duress as would constitute a defense to prosecution;

"(4) the defendant was an accomplice, the conduct constituting the offense was principally the conduct of another person, and the defendant's participation was relatively minor;

"(5) the defendant could not reasonably have foreseen that his conduct in the course of the murder for which he was convicted would cause, or would create a grave risk of causing, death to any person."

Id. §§ 2401(a)-(b) (italics deleted). Section 2402(d) provides for a special verdict as to the existence of the aggravating and mitigating factors set forth in section 2401. Section 2402(e) provides:
individual cases and rationality in patterns of the imposition of the death sentence nationwide.\textsuperscript{40}

The bill provides for a special verdict by the court or jury as to the existence or nonexistence of each of the aggravating and mitigating factors.\textsuperscript{41} The verdict is delivered following a special sentencing hearing held after the jury has returned a verdict of guilty.\textsuperscript{42} The sentencing proceeding is conducted either before the jury that determined the defendant's guilt, before a jury specially impanelled for the sentencing hearing if the trial jury is unavailable, or before the judge alone if the defendant so requests and if the court and the Government approve.\textsuperscript{43}

At the sentencing hearing, the court must disclose to the defendant or defendant's counsel all material contained in the presentence report, if one has been prepared, with one exception. The court need not disclose any material which it determines "is required to be withheld to protect human life or to avoid impairment of the national defense."\textsuperscript{44} Information withheld from the defendant under the stated exception shall not be considered by the factfinder in determining whether any of the specified aggravating or mitigating circumstances are present.\textsuperscript{45} Any information relevant to the existence or nonexistence of any of the aggravating factors may be presented by either the Government or the defendant, if it is admissible "under the rules governing the admission of evidence at criminal trials."\textsuperscript{46} Any information relevant to the mitigating factors may be presented by either side, regardless of whether it is admissible under the usual rules of evidence.\textsuperscript{47} Both sides "shall be given fair opportunity to rebut any information received at the hearing, and to present argument as to the adequacy of the information" used to establish the existence of any of the aggravating or mitigating

\textit{\textsuperscript{(e) Sentence.}}—If the jury or, if there is no jury, the court finds:

"(1) that one or more of the factors set forth in section 2401(a)(1) or (a)(2) exists, and that none of the factors set forth in section 2401(b) exists, the court shall sentence the defendant to death;

"(2) that none of the factors set forth in section 2401(a)(1) or (a)(2) exists, or that one or more of the factors set forth in section 2401(b) exists, the court shall not sentence the defendant to death but shall impose any other sentence authorized for a Class A felony under the provisions of section 2001."

\textit{Id.} § 2402(e).

\textsuperscript{40} \textsc{Draft Committee Report, supra} note 14, at 919.
\textsuperscript{41} \textsc{S. 1, supra} note 8, § 2402(d).
\textsuperscript{42} \textit{Id.} § 2402(a).
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} \textit{Id.} § 2402(a).
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} \textit{Id.}
circumstances. The Government carries the burden and must prove beyond a reasonable doubt the existence of any of the aggravating factors. The defendant carries the burden and must prove by a preponderance of the evidence the existence of any of the mitigating factors, which "shall be liberally construed." 

Although S. 1 provides for appellate review of a death sentence if the defendant files a timely appeal, the review is sharply limited in scope. The appropriate federal court of appeals—after sifting the trial evidence, any presentence report, information submitted during the sentencing hearing, the procedures used at the hearing, and the sentencing body's findings concerning aggravating and mitigating circumstances—determines whether (1) the sentencing hearing procedures were "contrary to law" and (2) the findings relating to aggravating and mitigating circumstances were "clearly erroneous." In making the second determination, the appellate court must act with "regard for the opportunity of the jury, or if there was no jury, the district court, to observe the defendant." If the appellate court finds that the sentencing procedures conformed to law or were contrary only in a manner constituting harmless error, and that the findings of specific circumstances were not clearly erroneous or "were clearly erroneous but the sentence was not affected," the court must affirm the death sentence. If the court determines that the sentencing procedures were contrary to law, and not harmless error, it must remand the case for resentencing under the proper procedures. Only if the court determines that a finding of the presence or absence of special circumstances was clearly erroneous, "and that the sentence was affected by such finding," is it directed to remand for imposition of "a sentence other than death." 

Although the procedures outlined above for determining whether to inflict capital punishment are undoubtedly more considerate of human life than the old system of standardless discretion, it is equally plain that they do not remove discretion from the death sentencing process. Discretion under S. 1 begins with the selection of trial jury, sentencing jury, or judge to hear the Government's case for and the de-
fendant's case against capital punishment. Although the defendant apparently is accorded the right under the statute to demand a jury for the sentencing hearing, there is no right to accept or reject the jury which tried the case. The trial jury's availability for sentencing purposes is governed by factors beyond the defendant's control. A defendant who fears sentencing by a jury that failed to heed, for example, evidence of self-defense, has no choice but to request sentencing by the judge. Even then the defendant will have to accept sentencing by the trial jury if the court or the Government does not approve the request. Since no standards are set to govern the court's or the Government's decision to accept or reject the defendant's request, that decision may be made on a wholly arbitrary basis. It may be made for reasons which are discriminatory or trivial, or both. Yet unless it is possible to say with certainty that the judge and the jury would have reached the same conclusion as to each possible aggravating or mitigating circumstance (or that discrepancies in their findings would not have produced a discrepancy in the ultimate sentence imposed), a standardless decision as to whether to permit sentencing by the court instead of by the jury may be the crucial factor in determining whether or not the defendant is sentenced to death.

In the ordinary criminal case, such discretionary factors are perceived as marginal and accepted as inevitable in a system of justice created and operated by fallible human beings. But, as Professor Charles L. Black, Jr. has persuasively argued, discretion used to impose the absolute penalty of death must be closely confined, if discretion is to be allowed at all. The process that is due a man or a woman confronting the possibility of execution is far more stringent than the process owed to one who faces a small fine or even a moderate prison sentence. Our system of constitutional law has long recognized that, as Black notes,

requirements of fairness, certainty, and so on—all the things we mean when we say "due process of law"—vary with the seriousness of the

57. See id. §§ 2402(a)(1), (2), (3).
58. Id. § 2402(a) (3).
59. See Kalven & Zeisel, supra note 7, at 436. In 21 of 111 potentially capital cases studied, the judge and the jury disagreed on the death penalty. But the judge, not the jury, was more likely to believe that capital punishment was justified. In 14 (two thirds) of the cases where judge and jury disagreed on the penalty, the judge favored death. In only seven (one third) of the cases in which there was disagreement, did the jury favor death when the judge opposed it.
60. Black, supra note 13, at 32-36.
61. Id. at 32, 33-34.
interest at stake, and that, as a corollary, imposition of the penalty of death carries with it a more exacting requirement than other punitive action of the political society.62

In recognition of that fact, the Supreme Court has upheld, against federal constitutional challenge, state laws which imposed stricter standards on trials in capital cases than in other cases.63 Long before the Court ruled that all indigent felony defendants were entitled to trial lawyers at the state's expense,64 it held that the states must provide adequate counsel for defendants in capital cases.65

Justice Powell, dissenting in Furman, attempted in part to answer this argument by pointing out that the due process clause makes no distinction between deprivation of life and deprivation of liberty.66 "If discriminatory impact renders capital punishment cruel and unusual," Powell deduced, "it likewise renders invalid most of the prescribed penalties for crimes of violence."67 But the due process clause also makes no distinction between deprivation of property and deprivation of life. The Supreme Court has held that property may be summarily seized in certain emergencies where the public welfare imperatively requires it.68 Using Powell's logic, the Court might permit summary execution of dangerous individuals under certain circumstances. No one seriously argues that we have yet reached the point where such a holding is possible. Powell's argument, if it proves anything, proves too much. The due process guarantee continues to require a painstaking inquiry into the facts and circumstances and a serious attention to the gravity of the loss involved in each particular case.69

62. Id. at 33.
66. 408 U.S. at 447 (Powell, J., dissenting).
67. Id.
68. See Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (summary seizure to protect public from misbranded drugs); Fahey v. Mallonee, 332 U.S. 245 (1947) (summary seizure to protect against economic disaster of a bank failure); Phillips v. Commissioner, 283 U.S. 589 (1931) (summary seizure to collect the internal revenue of the United States); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921) (summary seizure to meet the needs of a national war effort); North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (summary seizure to protect public from contaminated food).
69. See, e.g., Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (minimum due process requirements not met in parole revocation hearing); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961) (civilian cook for United States Navy, dismissed for failure to pass security requirements, was not denied due process).
Just as standardless, uncontrolled discretion may enter the choice of a sentencing authority, so too it may dictate the preparation or the failure to prepare a presentence report. Since no report is required by the statute, the decision is apparently left up to either the court, which could order the preparation of such a report, or to the Government. Probably more important to the ultimate outcome, however, is the discretion expressly given to the trial court not to disclose any material contained in the presentence report which the court determines must be withheld “to protect human life or to avoid impairment of the national defense.”

As clear as these guidelines may appear at first reading, they are not matters which can be decided with unequivocal confidence. How is a court to be sure whether disclosure of the source of information unfavorable to a violence-prone defendant will endanger the informant’s life? Can a court accurately determine whether failure to disclose that information may deprive the defendant of leads to witnesses that he needs in order to establish a mitigating circumstance and to avoid the death sentence? Moreover, recent history has proved that standards similar to “impairment of the national defense” are exceedingly difficult to apply. Intensive litigation over the “national security” exception to the Freedom of Information Act demonstrates that reasonable men and women—including judges—may differ over the meaning of such terms. The executive branch of government has consistently sought, though not always successfully, the broadest possible definition of its authority to act beyond judicial control and without accountability to individual defendants in matters relating to national security or national defense.

The Judiciary Draft Committee Report on S. 1 suggests that any problems are solved by the further provision forbidding the sentencing body to consider material withheld from the defendant when it determines the existence of any aggravating circumstance or the absence of any mitigating circumstance. “Implicit in the language of this subsection,” the report explains, “is the intention that if evidence tending to establish one of the designated mitigating factors or tending to disprove one of the aggravating factors is withheld from the defendant, the sen-

70. See S. 1, supra note 8, §§ 2402(b), 3726(b)(2).
71. Id. § 2402(b).
entence of death shall not be imposed." But since the court may not always know what evidence the defendant could develop on the basis of the evidence withheld, the implication is at best an expectation that may be negated in practice. Since a sentencing jury presumably will have no knowledge of material withheld from the defendant, it could base a finding of an aggravating factor, or of the absence of a mitigating factor, on available evidence that is to some extent countered, or altered in its relation to the circumstances, by evidence which is unavailable to the jury.

Similarly, the court's decisions regarding the admissibility of evidence under the Federal Rules of Evidence inevitably require the exercise of discretion. Although that discretion is channeled by formal rules, it can be—and often has been—exercised in ways which are properly characterized as "mistaken." The Supreme Court has recognized in several rulings that judicial mistakes concerning the admissibility of evidence can constitute prejudicial error. This is, of course, a risk that we run in every trial, criminal or civil. But how many of us are comfortable with the notion that a person may be executed because of such a judicial error, insulated from review perhaps by an incompetent counsel's failure to file a timely appeal or by an insufficiently indigent defendant's inability to raise the funds for counsel on appeal?

Although provision for appellate review offers an opportunity for "correction" at a higher level of substantive and procedural mistakes by the trial court, it again injects a substantial measure of discretion into the sentencing process. Federal appellate courts are not always internally consistent, nor do the eleven circuit courts of appeals invariably decide similar (even virtually indistinguishable) issues of law.

74. DRAFT COMMITTEE REPORT, supra note 14, at 925.
76. E.g., id.; Roaden v. Kentucky, 413 U.S. 496 (1973). Many Supreme Court cases have involved disputes over the scope and application of the exclusionary rule which forbids admission of evidence in a criminal proceeding against the victim of an illegal search and seizure, if such evidence was obtained in violation of the fourth amendment. See United States v. Calandra, 414 U.S. 338 (1974); Wong Sun v. United States, 371 U.S. 471 (1963); Weeks v. United States, 232 U.S. 383 (1914).
77. See BLACK, supra note 13, at 85-89. Because adequate investigation and good representation, at all stages of the criminal process from plea bargain through trial and appellate review to clemency request, cost significant amounts of money, Black argues:

We are running a system, therefore, which from the beginning—from the hours and days following arrest—so operates as to make it enormously more difficult for the poor to bring out all the truth than it is for the well-to-do to bring out all the truth. This is, of course, just another way of saying that both conviction and conviction by mistake are from the beginning made much more likely for the poor.

Id. at 86.
and fact in the same way. Although conflict between the circuits is a major factor in influencing the Supreme Court to accept a petition for certiorari, it is not compelling in every instance. Yet it is contrary to our sense of justice as fairness—the treating of like cases in like fashion, with due regard for irreducible individual differences—that a man or woman should live or die on the basis of random selection of a judicial panel. We take such chances, because under our present legal system we must, when lesser stakes are involved. A deliberate choice to accept those risks when death is the penalty at the very least raises more serious questions about how far we want to trust the legal process in translating difficult moral and legal distinctions from theory into practice.

Such questions can only be sharpened by the limited scope of review provided by S. 1. In particular, the "clearly erroneous" standard sets a high threshold for appellate judges to surmount in overturning a death sentence. Moreover, a court is required to affirm the sentence even where the findings as to a specific factor are clearly in error, if "the sentence was not affected." The meaning of this section must be that where two or more aggravating factors are found to justify the imposition of death, an appellate determination that any (or all) of the factors exceeding the minimum of one was clearly unfounded is not sufficient to reduce the penalty. Yet it is not so easy to decide whether

78. E.g., compare Cleveland v. Ciccone, 517 F.2d 1082 (8th Cir. 1975) (parolee imprisoned following new criminal conviction has right to prompt parole revocation hearing), with Gaddy v. Michael, 519 F.2d 669 (4th Cir. 1975) (parolee imprisoned following new criminal conviction has no right to prompt parole revocation hearing). Both cases claimed to be observing the mandate of Morrissey v. Brewer, 408 U.S. 471 (1972).


81. S. 1, supra note 8, § 3726(d)(1)(B).

82. S. 1 provides no judicial review of an "erroneous" failure to impose a death sentence. See id. § 3726(a). Thus, if no aggravating factors are found, or if any mitigating factors are found, there is no appellate determination of whether such findings were erroneous or not. Such a sentencing scheme is favorable to defendants who do not receive the death penalty from the sentencing court. But it also maximizes the potential for discretion and irrationality in the judge's or jury's manipulation of the aggravating and mitigating factors. Since erroneous noncapital sentences are never reviewed, the appellate courts have no opportunity to insure that the factors are applied the same way in like cases.

We tend... to think of persons' [sic] being "clearly guilty" of crimes for which they ought to die. Then some of them, by acts of pure grace, are spared—by prose-
the sentencing body (judge or jury) was influenced in the finding of one aggravating, and thus death-producing, factor by its findings as to the other factors. The judge or jury may be far more certain about the findings that the appellate court reverses than about the ones that the court affirms. Had the jury known that its conclusions about some factors were "clearly erroneous," it might have been unwilling to send a defendant to his death on the basis of a factor about which the jurors had substantial difficulty in making up their minds. Human decision-making invariably involves such imponderable and largely hidden referents. To reiterate, we accept them in most situations because in the real world, even the legal world, decisions must be made and must, at some point, become final even when they are demonstrably "wrong" according to the available sets of rules and principles by which we measure them. Such mistakes become less acceptable as their results become more serious.

Most crucial to the final disposition of the capital defendant's case may be the discretion exercised by the sentencing body in making its determinative findings of fact. Such discretion is only amplified by requirements as to the burden and the extent of proof. The "beyond

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cutors' discretion, by jury leniency, by clemency. After all, who can complain at not receiving a pure favor? . . .

The trouble is that the system may just as well be viewed, and with enormously higher accuracy, if numbers count, must be viewed, as one in which a few people are selected, without adequately shown or structured reason for their being selected, to die.

Black, supra note 13, at 93.

83. Professor Black points out that "mistake" and "arbitrariness" are reciprocally related. A decision is mistaken when it fails to follow established rules and guidelines; for example, a defendant may have been "insane" according to the legal definition although the jury found him sane. Black continues:

Secondly, there may either be no legal standards governing the making of the choice, or the standards verbally set up by the legal system for the making of the choice may be so vague, at least in part of their range, as to be only apparent standards, in truth furnishing no direction and leaving the actual choice quite arbitrary.

These two possibilities have an interesting (and, in the circumstances, tragic) relationship. The concept of mistake fades out as the standard grows more and more vague and unintelligible . . .

Black, supra note 13, at 19. The insanity defense, in all its various permutations, is a good example of standards which are both exceedingly complex and, in places at least, exceedingly vague. See id. at 50-55. See generally A. Goldstein, The Insanity Defense (1967) [hereinafter cited as Goldstein].

84. This discretion is practically impossible to control, since, in the sentencing stage as in the trial stage, the processes by which the factfinder reaches its conclusions are largely invisible. The history of mandatory capital punishment in the United States and England is filled with examples of jury nullification, in which juries refused to convict "palpably guilty men" because conviction carried an automatic death sentence. See Kalven & Zeisel, supra note 7, at 435; Mackey, The Inutility of Mandatory Capital Punishment: An Historical Note, 54 B.U.L. Rev. 32, 34 (1974).
a reasonable doubt" standard is an ancient one, cemented into our legal process. Yet fierce battles have raged over its meaning and specifically over the verbal formulations by which legislators and judges seek to explain to the jury what the standard actually means. As Professor Wigmore has observed: "The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be yet no successful method of communicating intelligibly . . . a sound method of self-analysis for one's belief." A major study of American juries concluded that judges and juries differ as to the intensity or amount of proof required by the standard, the juries setting a higher threshold than the judges. The "preponderance of the evidence" standard, though plainly less difficult to reach than the "reasonable doubt" standard, is perhaps somewhat clearer: if the facts piled onto the scales of justice tip the defendant's way at all, he wins. But even that standard is not free from doubt.

The heavier burden placed upon the Government, to establish aggravating factors by proof beyond a reasonable doubt while the defendant need only prove mitigating factors by a preponderance of the evidence, is unquestionably favorable to the defendant. As the Draft Committee Report on S. 1 notes, it is "a further attempt to insure that the punishment [of death] is not erroneously implemented." But it is only an attempt. As the report's drafters realized, they are not dealing with certainties. Although the statute provides that mitigating elements are to be "liberally construed," the report warns that this language is meant only to "assure against erroneous application of the rule of strict construction to limit improperly" the mitigating factors. The report directs the sentencing body not "to avoid imposition of the penalty where the terms of the statute would warrant imposition

86. 9 J. Wigmore, Evidence § 2497, at 325 (3d ed. 1940).
87. Kalven & Zeisel, supra note 7, at 187.
88. Justice Harlan, concurring in In re Winship, 397 U.S. 358 (1970), noted that "[t]he preponderance [of the evidence] test has been criticized, justifiably in my view, when it is read as asking the trier of fact to weigh in some objective sense the quantity of evidence submitted by each side rather than asking him to decide what he believes most probably happened." Id. at 371 n.3. According to Harlan, the most sensible explanation of the test is that it requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence [in order to] find in favor of the party who has the burden to persuade the trier of the fact's existence." Id. at 371-72.
89. Draft Committee Report, supra note 14, at 926.
90. Id.
These terms are not quoted in an attempt to quibble with the drafters of the statute or of the report. They are cited as an example of the difficulties inherent in specifying the exact meaning of words in context, even words like "liberally construed" or "strict construction" which are, to some extent, legal terms of art. One wonders what the term "strict construction" means to laypersons who have been instructed, or misinstructed, by the political branches of government in recent years. And in this, as in other areas of the law noted above, even judges do not always agree.

IV.

S. 1 provides for the death penalty in two classes of federal cases: national security offenses (treason, sabotage, and espionage) and murder. If a national security offense is involved, the defendant must be convicted of the most severe grade of that offense, a "Class A felony" under S. 1's terminology, before the death penalty may be considered by the sentencing body.

A person is guilty of Class A treason under S. 1 "if, while owing allegiance to the United States, he . . . adheres to the foreign enemies of the United States and intentionally gives them aid and comfort . . . ." The drafters of S. 1 presumably believed that this historic formulation would preserve the limits of existing law, including the necessity of an "intent to betray." But the contours of existing law are not entirely clear. During World War II, a federal district court declared that even "[i]n times of peace it is treason for one of our citizens to incite war against us." Incitement, as a term and a concept, has a long and checkered history in our constitutional law, particularly the law of the first amendment. If so volatile and so cloudy

91. Id.
92. S. 1, supra note 8, § 2401(a).
93. Id. § 1101.
94. Id. § 1111.
95. Id. § 1121.
96. Id. § 1601.
97. Id. § 2401(a).
98. Id. § 1101(a)(1). The violation of this section constitutes a Class A felony. Id. § 1101(c)(1).
an element may be introduced into the law of treason, the trial jury's determination of guilt, before the sentencing stage is even reached, may require the application of delicate, subtle, and elusive points of law to a perhaps bewildering and contradictory array of facts. That, of course, is what juries are for. But it is scarcely a situation in which we can say with confidence that arbitrariness has been ruled out, or that discretion can only be exercised within the closely confined limits which even the drafters of S. 1 concede may be necessary in cases where the death penalty may be imposed.

Nor is incitement the only potentially difficult point of law involved in finding a person guilty of a Class A treason as defined by S. 1. Shortly after World War II, two federal courts affirmed the guilt of propaganda broadcasters as traitors. Such decisions cast doubt, perhaps constitutional doubt, on the statutory formulation of treason. If the statutory terms can encompass activities normally protected by the free speech guarantee of the first amendment, the statute may well be void for vagueness, or overbreadth, or both. In areas other than national security, the Supreme Court has frequently declared that criminal statutes which touch upon first amendment freedoms must be written to forbid a narrow and specifically defined class of conduct which genuinely endangers the public welfare.

A person is guilty of sabotage under S. 1 "if, with intent to impair, interfere with, or obstruct the ability of the United States or an associate nation to prepare for or to engage in war or defense activities, he . . . damages, tampers with, contaminates, defectively makes, or defectively repairs . . . any property used in, or particularly suited for use in, the national defense . . . ." The property must be either owned by or


104. See generally Amsterdam, The Void for Vagueness Doctrine in the Supreme Court, 109 U. PA. L. Rev. 67 (1960). An unconstitutionally vague statute is one "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). Such a statute "violates the first essential of due process of law." Id. See Palmer v. City of Euclid, 402 U.S. 544, 545 (1971). An overbroad statute is one which sweeps within its prohibition both conduct which may properly be made criminal and conduct which is protected by the first amendment. See NAACP v. Button, 371 U.S. 415, 433, 438 (1963); Speiser v. Randall, 357 U.S. 513, 526 (1958).


106. S. 1, supra note 8, § 1111(a).
somehow under the care of the United States or an "associate nation"\textsuperscript{107} or under construction, repair, manufacture, transport, or storage for the United States or an associate nation.\textsuperscript{108} Delivering such property can also be sabotage.\textsuperscript{109} In order to be a Class A offense, the sabotage must be "committed in time of war" and damage or impair "a major weapons system or a means of defense, warning or retaliation against large scale attack . . . ."\textsuperscript{110}

Despite the complexity of its verbal formulation, sabotage looks at first like a carefully defined crime. But S. 1 nowhere defines its central concept, "war" or "in time of war." It is therefore not clear whether sabotage committed during a war which was not declared by Congress\textsuperscript{111} would be a Class A felony. Since neither the Vietnamese nor the Korean war was ever declared by Congress, the determination of the meaning of "war" is plainly a problem with real-world consequences. Suppose further that the sabotage sections of S. 1 had been in effect during the demonstrations against the war in Vietnam. Such demonstrators might well have been found to have the requisite intent to obstruct the United States' ability to engage in the war. Suppose that they somehow managed to scrawl obscenities on the walls of a military facility designated for defense, warning, or retaliation against large scale attack. Is that a proper case for the imposition of the death penalty? Yet a jury or judge in the exercise of its discretion as a fact-finder could (although it almost certainly would not) find the demonstrator guilty of a Class A sabotage, punishable by death.

A person is guilty of espionage under S. 1 "if, knowing that national defense information could be used to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power," he communicates such information to a foreign power, collects such information "knowing that it may be communicated to a foreign power . . . ."\textsuperscript{112} or enters a "restricted area"\textsuperscript{113} with the intent to obtain such

\textsuperscript{107} S. 1 defines an "associate nation" as "a nation at war with a foreign power with which the United States is at war." \textit{Id.} \textsection 111.
\textsuperscript{108} \textit{Id.} \textsection 1111(a)(1)(A).
\textsuperscript{109} \textit{Id.} \textsection 1111(a)(2).
\textsuperscript{110} \textit{Id.} \textsection 1111(b)(1).
\textsuperscript{111} The United States Constitution grants Congress, not the President, the power to declare war. \textbf{U.S. Const. art. I, \textsection 8, cl. 11}.
\textsuperscript{112} S. 1 defines a "foreign power" broadly as "a foreign government, faction, party, or military force, or persons purporting to act as such, whether or not recognized by the United States" or "an international organization." S. 1, \textit{supra} note 8, \textsection 111.
\textsuperscript{113} S. 1 defines a "restricted area" as an area of land, water, air, or space that includes a facility of the United States, or a facility of a contractor or subcontractor working with or on behalf of the United States, to which access is restricted pursuant to a statute or an executive
information, knowing that it may be communicated to a foreign power.\textsuperscript{114} The offense is a Class A felony if committed "in time of war or during a national defense emergency" or if the information directly concerns major military weapons, major defense systems, war plans, communications intelligence of cryptography, or if the information is "restricted data."\textsuperscript{115}

The espionage sections of S. 1 are open in many ways to constitutional challenge. They are as potentially vague and overbroad as many statutes which have been struck down by the Supreme Court for invading the territory protected by the first amendment.\textsuperscript{116} Although "national defense information" is defined primarily in relation to military information,\textsuperscript{117} its limits are not clear. It includes, among other categories, information that "relates to . . . military capability of the United States or of an associate nation"\textsuperscript{118} and information that "relates to . . . intelligence concerning a foreign power,"\textsuperscript{119} unless the information "has previously been made available to the public pursuant to authority of Congress or by the lawful act of a public servant . . . ."\textsuperscript{120}

Under such broad terminology, newspapers which published "leaked" information that United States troops were supplied with malfunctioning rifles (no secret, of course, to the enemy)\textsuperscript{121} or that a president or important military officer had displayed erratic behavior\textsuperscript{122}
could be prosecuted for collecting national defense information, knowing that it may be "communicated" to a foreign power and that it could be used to prejudice the nation's "safety or interest" or "to the advantage" of some "foreign government, faction, party, or military force" or some "international organization." Terms like "safety or interest" are themselves open to a broad range of interpretation. Is it in our national "interest" for the Government to conceal information about our military deficiencies (or our military surfeits) from the public? Are we more or less "safe" if we do or do not know about our Government's methods of collecting intelligence data "concerning" a foreign power? (Note that the definition is not restricted to intelligence gathering abroad, but could apply equally to such actions as burglaries of the homes within the United States of foreign visitors or their suspected contacts among the American public.)

The problem with such broad statutory definitions is not limited to the unreviewable discretion they accord to the trial jury in finding the facts and relating them to the law. When a statute potentially reaches a vast array of loosely-defined activities, it gives the prosecutor an almost totally uncontrolled discretion to pick and choose among prospective defendants. That, of course, is one of the traditional objections to vagueness and overbreadth in criminal statutes. But it applies with special force when the prosecutor's choice may eventually result in the death of an individual whose mission was not to subvert the Government or aid a genuine enemy, but to inform the public about the issues with great impact on our national life.

(editorial observes that Watergate incident has increasingly impinged on Nixon's ability to conduct foreign policy).

123. S. 1, supra note 8, § 111.

124. See N.Y. Times, Dec. 22, 1974, § I, at 1, col. 8 (report describes allegedly illegal Central Intelligence Agency activities within the United States since 1950's, including break-ins, wiretaps, and surreptitious mail inspection).


126. The Government chose to prosecute Daniel Ellsberg, the distributor of the Pentagon Papers, under 18 U.S.C. § 793(e) (1970), which forbids "unauthorized possession" of national defense information or delivery of such information to "any person not entitled to receive it . . . ;" and 18 U.S.C. § 641 (1970), proscribing unlawful conversion of "any record" of the United States to one's own use. See United States v. Doe, 455 F.2d 1270 (1st Cir. 1972). The maximum authorized penalty for each offense is ten years imprisonment, a $10,000 fine, or both. An attempt to prosecute Ellsberg under 18 U.S.C. § 794(a) (1970), which carried a potential death penalty, at least until Furman was decided in June, 1972, probably would have founded on that section's requirement of "intent or reason to believe that [the national defense information communicated or delivered to a foreign government] is to be used to the injury of the United States or to the advantage of a foreign nation . . . ." Id. (emphasis added). By
The foregoing comments suggest some of the difficulties involved in drafting statutes which draw clear lines between criminal and permissible conduct, especially in so sensitive and political an area as national security. Instead of seeking to overcome such difficulties by careful draftsmanship, the drafters of S. 1 have reached out to encompass a broad field of potential activity by persons who do not share the Government's perceptions about the national interest and who wish to challenge its policies and programs.

Similarly, in listing the aggravating factors on which the sentencing of a "Class A" spy, saboteur, or traitor would turn, S. 1 uses language which is much too vague to give genuine guidance to the exercise of discretion by the sentencing factfinder. The death penalty is made mandatory where the defendant, in the commission of the national security offense of which he has been found guilty, "knowingly created a grave risk of substantial impairment of the national defense" or "knowingly created a grave risk of death to any person . . . ." There is simply no convenient means to calibrate the gravity of risks, so as to insure that independent decision-makers will invariably (or even usually) arrive at the same conclusions. A "grave" risk is more than a "light" risk or a "moderate" risk. But is it equal to or greater than a "serious" risk? Does "grave" carry the connotation of "imminent" or "clear and present"? Or doesn't it? S. 1 and the report do not say.

Suppose a defendant, in the course of collecting "national defense information" carelessly throws a still-lighted match into a paper-filled wastebasket in an empty office. Firefighters, called to quell the resulting blaze, run serious risks of injury. Did the defendant "knowingly create a grave risk of death to any person"? Answering the question

\footnote{S. 1's espionage provision requires only knowledge that the information could be used to the prejudice of the safety or interest of the United States or to the advantage of a foreign power. Moreover, section 794(a) requires communication or the attempted communication to the foreign power. S. 1's espionage section requires only collection of such information (or entry into a restricted area with intent to collect such information), with knowledge that it may be communicated to a foreign power. S. 1, supra note 8, §§ 1121(a)(2), (3). Under present law, capital punishment is reserved for those spies who attempt to give the information to a foreign power. Under S. 1, someone like Ellsberg, who simply reveals national defense information to the public, could be prosecuted for espionage on the grounds that he must have known that such information, once made public, might well be communicated to a foreign power. 127. S. 1, supra note 8, §§ 2401(a)(1)(B), (C). The death penalty is also required if the national security offender has previously been convicted of a separate act of treason, sabotage, or espionage for which a sentence of life imprisonment or death was authorized by statute. Id. § 2401(a)(1)(A).}
will inevitably require the sentencing judge or jury to entangle the truth from a contradictory mass of evidence concerning intent, foreseeable consequences, intensity of the risk, and the like. Does the outcome have the requisite degree of certainty for a decision which may make the difference between life and death? One can imagine similar difficulties arising when a sentencing body is forced to struggle with the exact nature of a “grave risk of substantial impairment of the national defense.” What is a “substantial” impairment, as opposed to an insubstantial one? Is national defense “impaired” if traffic to and from a major defense facility is blocked for a few hours by antiwar demonstrators? None of these questions have even reasonably clear answers.

V.

If the potentially capital offense is murder as defined by S. 1,128 a new set of problems arises. S. 1 does not employ the common distinction between first- and second-degree murder.129 Instead, it defines murder primarily as “engag[ing] in conduct that knowingly causes the death of another person . . . ”130 Murder is also committed by engaging “in conduct that causes the death of another person under circumstances in fact manifesting extreme indifference to human life,”131 or by participating in one of several enumerated felonies during which the offender or another participant “in fact causes the death” of a non-participant in the felony.132

According to S. 1, a person’s state of mind is knowing “with respect to . . . his conduct if he is aware of the nature of his conduct . . . .”133 He is “knowing” about an existing circumstance “if he is aware or

128. Id. § 1601.

129. The California formulations are typical: First-degree murder is the premeditated, willful, and deliberate unlawful killing of a human being with malice aforethought. It also includes murder done by a destructive device or explosive, poison, lying in wait, or torture or in an attempted or successful arson, rape, robbery, burglary, mayhem, or lewd and lascivious act against a child under the age of 14. CAL. PENAL CODE §§ 187, 189 (West 1970). All other unlawful killings of a human being with malice, but without premeditation, are second-degree murder. See People v. Harmon, 33 Cal. App. 3d 308, 108 Cal. Rptr. 43 (1973).

130. S. 1, supra note 8, § 1601(a)(1). Federal jurisdiction over murder is limited to murders occurring within the special territorial, maritime, or aircraft jurisdiction of the United States, murders of United States officials and certain federal public servants engaging in their official capacities, murders of foreign dignitaries, officials, and their families, murders committed by mail, and murders which occur during commission of certain federal felonies. Id. § 1601(e).

131. Id. § 1601(a)(2).

132. Id. § 1601(a)(3).

133. Id. § 302(b)(1).
believes that the circumstances exists . . . "134 And he is "knowing" about "a result of his conduct if he is aware or believes that his conduct is substantially certain to cause the result."135

The first definition of “knowing” may smuggle in one of the ancient tests for insanity (and thus, for non-culpability): if the actor thinks he is peeling a banana when he flays his victim he is presumably not "aware of the nature of his conduct." Beyond such clear cases, however, it is difficult to see how the first kind of “knowing” will necessarily limit the culpability of anyone who “in fact” produces the death of another.136 The third kind of “knowing,” concerning the results of one's conduct, requires belief in the substantial certainty of the result. Such language seems reasonable, since nothing in this world is absolutely certain. But where is the dividing line between a “moderate” certainty and a “substantial” certainty? Can we rely on sentencers to draw it in the same place on every occasion? Yet, if we cannot, it is hard to justify capital punishment on the basis of such semantic predications.

The second kind of murder defined in S. 1 requires no particular state of mind in relation to the circumstances under which the murder is committed. If the circumstances “in fact” show “extreme indifference to human life,” that is enough to satisfy the statute. Presumably such a definition is designed to avoid the difficulties of proving various states of mind, without completely ignoring the general requirement of mens rea.138 Even if we can accept the statutory framework,

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134. Id. § 302(b)(2).
135. Id. § 302(b)(3).
136. In California the test has been stated as whether at the time of the offense the defendant was suffering from "'such a defect of reason, from disease of the mind, as not to know the nature and quality of his act . . . .'" People v. Sturgess, 178 Cal. App. 2d 435, 441, 2 Cal. Rptr. 787, 791 (1960), quoting People v. Nash, 52 Cal. 2d 36, 39 n.1, 338 P.2d 416, 417 n.1 (1959); see People v. Berry, 44 Cal. 2d 426, 433, 282 P.2d 861, 865 (1955).
137. According to S. 1. "'in fact' means that the matter to which the phrase applies is not a matter as to which a state of mind must be proved[.]" S. 1, supra note 8, § 111.
138. See id. §§ 303(a)(2), (b). In the traditional formulation, the existence of a crime requires two essential elements: an act or omission prohibited by the criminal law and a state of mind variously referred to as criminal intent, guilty knowledge, or mens rea. See 17 CAL. JUR. 3d Crim. Law § 3. In Morissette v. United States, 342 U.S. 246 (1952), in which a classic discussion of mens rea appears, the Court picturesquely describes the requirement for a criminal act as "concurrence of an evil-meaning mind with an evil-doing hand . . . ." Id. at 251. When a person capable of criminal intent commits an act prohibited as a crime, however, the law infers criminal intent from his intent to do the prohibited act. See People v. Dillon, 199 Cal. 1, 7, 248 P. 230, 232 (1925). The Supreme Court has observed that most federal crimes require "proof of the existence of a certain mental state . . . ." The existence of a mens rea is the rule of,
the notion of "extreme indifference" is fraught with problems similar to those raised by the terms "grave risk" and "substantially certain." Extreme indifference is a lot of indifference. But how much? And how do we insure that the decision-maker interprets the terms in like fashion in like cases? Appellate review which limits reversal to "clearly erroneous" findings is not likely to add more than a modicum of rationality and predictability. The rest is discretion.

The third kind of murder under S. 1 not only requires no particular state of mind in relation to the possible results of one's conduct (other than the state of mind necessary for conviction of the concomitant felony), it does not even require personal action by the defendant at all. This section combines the felony-murder rule and the vicarious felony-murder rule doctrines which justly have been described as "the harshest instance of strict liability in our criminal law." Although there is no unusual room for discretion, other than that inevitably involved in factfindings about causes and effects, this section of S. 1 is open to serious challenge on policy grounds. The felony-murder rule cannot and does not fulfill S. 1's apparent purpose to single out the worst criminal offenders for the death penalty. An "accidental" killing during a felony, especially when committed by someone other than the defendant whose death is being considered, is not the moral equivalent of a deliberate murder planned and carried out by the individual whose fate is at stake.

S. 1 provides eight aggravating factors which, in the absence of a mitigating factor, require imposition of the death sentence on a convicted murderer. The first of these is an extension of the felony-murder rule, demanding death for the commission of a murder during

rather than the exception to, the principles of Anglo-American criminal jurisprudence." Dennis v. United States, 341 U.S. 494, 500 (1951). See also J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 133-34 (2d ed. 1960):

The relevant ethical principle expressed in terms of mens rea, that penal liability should be limited to the voluntary (intentional or reckless) commission of harms forbidden by penal law, represents not only the perennial view of moral culpability, but also the plain man's morality.

139. KALVEN & ZEISEL, supra note 7, at 442 n.12.
140. See DRAFT COMMITTEE REPORT, supra note 14, at 911, 916.
141. Justice Brennan, concurring in Furman, noted that the named petitioner's crime was an accidental killing in the course of a felony, the Georgia Supreme Court having accepted Furman's story that he tripped over a wire, causing his gun to go off. 408 U.S. at 294 n.48. As Brennan wrote, if "Furman or his crime illustrates the 'extreme,' then nearly all murderers and their murders are also 'extreme.'" Id. at 294. See Note, You May Kill, But You Must Promise Not to Use Discretion, 6 LOY. L.A.L. REV. 526, 531-33 (1973).
selected felonies—treason, sabotage, espionage, escape,\textsuperscript{142} kidnapping,\textsuperscript{148} aircraft hijacking,\textsuperscript{144} or arson.\textsuperscript{145} The Draft Committee Report explains that “[t]hese offenses are regarded as of such magnitude and so inherently dangerous to life that, when coupled with the commission of murder, they call for the imposition of the ultimate penalty.”\textsuperscript{146} Yet it is hard to see why either espionage, as broadly defined under S. 1, or escape is more dangerous to life than, for instance, rape\textsuperscript{147} or maiming\textsuperscript{148}—offenses which are included in the general felony-murder provision but not in the list of death-provoking felonies. The section suffers from the same policy difficulties as the felony-murder rule itself, although it does limit or negate most of the sentencing factfinder’s discretion.

A second aggravating factor is conviction “of another federal offense, or a state offense involving the death of a person,” committed either before or at the time of the murder for which the defendant has just been convicted, if a sentence of either life imprisonment or death was authorized for the other offense.\textsuperscript{149} This section requires the death penalty for “the multiple murderer as well as the repeat murderer.”\textsuperscript{150} It also reaches the federal offender convicted of any previous or concurrent Class A felony under S. 1.\textsuperscript{151} Since Class A felonies include the three most serious national security offenses which, as previously suggested, may by their terms be stretched to cover acts of political dissent, this section potentially requires the death penalty for persons whose “criminal record” is one of profound disagreement with the government in power rather than one of uncorrectable recidivist violence.

The imposition of the death penalty in cases governed by the second aggravating factor is a result, not of discretion exercised by the sentencing authority, but of discretion exercised further up the line by two trial juries (or judges). The first of the trial juries—the one which convicted the defendant of the prior offense now used to justify imposi-
tion of the death penalty but which failed to prescribe capital punish-
ment at that time—might not have convicted the defendant of such a
serious offense if it had understood that its actions would later be used
to inflict the death penalty. We can never be sure. Yet if we are not
sure, how can we say with certainty that this particular defendant is a
proper candidate for extinction?

A third aggravating factor is the defendant's previous conviction of
two or more federal or state felonies, committed on different occasions
before the time of the murder at issue, and "involving the infliction of
serious bodily injury upon another person". The report explains
that this factor is designed to punish with death the defendant whose
prior actions prove him to be "extremely dangerous to society.
There is some empirical support for the proposition that such defend-
ants are more dangerous than others. At least one study has found
that, as James Q. Wilson succinctly put it, "most murders are merely
'successful' assaults." Typically in such encounters, anger, perhaps
exacerbated by a longstanding grievance, sexual jealousy, or alcohol,
flares into violence among people who already know one another.
Whether the assault becomes a murder often depends on whether a
weapon is readily available and, if so, what sort of weapon it is.
Access to emergency medical care may also determine whether the vic-
tim winds up among the assault or the murder statistics.

Murderers with previous records are more likely to have a record
of assaults than of any other crime. Once such a violent person has
committed a murder and has been punished for it, however, the statisti-
cal correlation ends. It is a truism that murderers are the most successful
parolees, the offenders least likely to get into further trouble with the

152. Alternatively, the jury might have prescribed capital punishment which then was
not carried out for any one of a variety of reasons, such as commutation of the sentence
or abolition of the death penalty. In such cases, of course, the comment in the text is
irrelevant, since the original jury was willing to and did inflict the death sentence.
153. S. 1, supra note 8, § 2401(a) (2) (C).
154. DRAFT COMMITTEE REPORT, supra note 14, at 922.
155. J. Wilson, Thinking About Crime 194 (1975) [hereinafter cited as Wilson].
The study is reported in Zimring, The Medium is the Message, 1 J. LEGAL STUDIES 97
(1973).
156. Wilson, supra note 155, at 194.
157. Id. at 7. According to Wilson, in 1933 there were six times as many aggravated
assaults as homicides, but by 1960 the ratio had risen to 17 to one. See Wolfgang, A
Sociological Analysis of Criminal Homicide, in DEATH PENALTY IN AMERICA, supra note
3, at 74, 80 [hereinafter cited as Wolfgang].
158. Wolfgang, supra note 157, at 82.
The rational difficulty with the report's conclusion, therefore, is that instead of focusing on pre-murder deterrence of the assaultive defendant, it assigns the death penalty as punishment, at least in part, for social conditions the offender is not directly responsible for (e.g., the ready availability of lethal weapons and the failure of most police departments, prosecutors, and judges to treat non-murderous domestic violence as a serious problem until it is too late). Also, under the report's conclusion the offender is punished at a time when he is no longer statistically likely to repeat his violence. Moreover, this aggravating factor, like the one previously discussed, is infected with jury or judicial discretion exercised in the past when it was not foreseeable that a death sentence might ultimately result from a conviction. In any or all of the prior cases, the jury may have been only marginally convinced of the defendant's guilt. Though able to agree to a moderate punishment, it might not have been willing to accept capital punishment as a possible future consequence.

S. 1’s list of aggravating factors also includes the defendant who pays for murder or murders for pay. The latter category encompasses murder to gain an inheritance or a reward. Although such factors are defined with relative clarity, they are subject to the usual discretion inherent in the finding of facts on the basis of contradictory evidence.

A sixth aggravating circumstance is the status of the victim. S. 1 provides the death penalty for the murder of the President or a potential successor, the chief of state of a foreign power, “a foreign dignitary who is in the United States on official business” or certain types of federal “public servants” including a federal diplomat abroad, “a United States official,” a law enforcement officer, or an employee of an offi-

159. Bedau, Parole of Capital Offenders, Recidivism, and Life Imprisonment, in DEATH PENALTY IN AMERICA, supra note 3, at 395.
160. See Wilson, supra note 155, at 194: “An assault arising out of a domestic disturbance is likely to receive virtually no penalty under present circumstances.”
161. S. 1, supra note 8, § 2401(a)(2)(F).
162. Id. § 2401(a)(2)(G).
163. DRAFT COMMITTEE REPORT, supra note 14, at 922.
164. S. 1 defines a “public servant” as “an officer, employee, adviser, consultant, juror or other person authorized to act for or on behalf of a government or serving a government,” including persons elected, nominated, or appointed to such positions. S. 1, supra note 8, § 111.
165. S. 1 defines a “United States official” as the President, the President-elect, the Vice-President, the Vice-President-elect, a member of Congress, a member-elect of Congress, a Justice of the Supreme Court, or a member of the executive branch of government of cabinet rank.
166. Id.
cial detention facility . . . who is killed while engaged in the performance of his official duties," or because of his official actions or status.166 The Draft Committee Report explains that such persons were singled out not because of any belief that their lives are more valuable than the rest of ours, but because, "by virtue of the positions they hold, the persons in the classes designated are today frequently the subject of attack and assassination attempts. In view of their particular susceptibility, it was felt that the full force of the deterrent effect of capital punishment should be brought to bear in their defense."167

The report offers no empirical evidence to support either of its conclusions (that the classes named are more likely to be murdered than others not named, or that capital punishment will deter those who seek to kill certain kinds of public officials). It is virtually certain that no such evidence exists.168

The list of special victims includes cabinet officials, members of Congress, and Supreme Court Justices, yet the

166. Id. § 2401(a)(2)(H).
167. DRAFT COMMITTEE REPORT, supra note 14, at 923.
168. The aducement of any evidence of general deterrence through capital punishment statutes—much less deterrence of a specific class of potential murderers—is, to say the least, problematic. Most scholars have concluded that the death penalty has no deterrent effect. See, e.g., Campion, Does the Death Penalty Protect State Police?, in DEATH PENALTY IN AMERICA, supra note 3, at 301; A. CAMUS, REFLECTIONS ON THE GUILLOTINE 8-10, 16-21 (1959); DEATH PENALTY IN AMERICA, supra note 3, at 258-84; Graves, The Deterrent Effect of Capital Punishment in California, in DEATH PENALTY IN AMERICA, supra note 3, at 322; THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 352-53 (1968); Savitz, The Deterrent Effect of Capital Punishment in Philadelphia, in DEATH PENALTY IN AMERICA, supra note 3, at 315; Sellin, Homicides in Retentionist and Abolitionist States, in CAPITAL PUNISHMENT 135 (T. Sellin, ed. 1967); Wilson, supra note 135, at 190-93; Bedau, Deterrence and the Death Penalty: A Reconsideration, 61 J. CRIM. L., CRIM. & POL. SCI. 539 (1970); Browning, The New Death Penalty Statutes: Perpetuating a Costly Myth, 9 Gonzaga L. Rev. 651, 663-68 (1974) [hereinafter cited as Browning]; Glaser & Zeigler, Use of the Death Penalty v. Outrage at Murder, 20 CRIME & DELINQUENCY 333 (1974); Polsby, The Death of Capital Punishment? Furman v. Georgia, 1972 SUPREME COURT REV. 1, 35. The only serious study which argues that capital punishment is a significant deterrent is new and much disputed. Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 AM. ECON. REV. 397 (1975). Polsby, supra at 35-46, effectively demolishes the structure underlying many arguments in favor of the death penalty, including remarks by the late J. Edgar Hoover and several law enforcement officers, which are quoted with uncritical approval in the Draft Committee Report on S. 1. DRAFT COMMITTEE REPORT, supra note 14, at 913-15. As Polsby observes, appeals to the “experience” of law enforcement officers are no different in kind from arguments against the death penalty made on the basis of statistics, since statistical data reflect “nothing but experience.” Polsby, supra at 36 n.112. None of the law enforcement personnel quoted in the Draft Committee Report on S. 1 provides any statistical or objective support for his belief in the deterrent effect of capital punishment. The over-all tone is impressionistic and anecdotal.
lower federal judiciary have also been the targets of violence or threats because of their official actions. In a democratic society, rating of punishments by the victim's status seems peculiarly illegitimate, whatever the ostensible motive for doing so. Most important in terms of S. 1's overall policy, this aggravating factor will do nothing to insure that the "worst" criminals suffer the worst punishment. Under S. 1's sentencing scheme, the calculating killer of a child might be punished with imprisonment while the impetuous killer of a federal law enforcement officer or public official, absent mitigating circumstances, would suffer death.

Although the use of discretion appears to be limited under this aggravating factor, the problems which do exist are ones which have been difficult to resolve in other areas of the law. It is not clear in many cases whether someone is performing official or private acts. Suppose a member of Congress is attacked and killed late one evening while depositing a letter in a mailbox by persons who do not know the victim's identity. Nine tenths of the letter is personal, but the last paragraph concerns official business. Was he "engaged in the performance of his official duties"? Should the difference between imprisonment and death turn on the factfinder's answer to that question? Or suppose that the beleaguered head of a foreign government flees to the United States and announces that he is organizing a "government in exile." He is thereafter murdered. He is clearly a "foreign dignitary" under S. 1's definition. But was he "in the United States on official business"? Perhaps these examples seem unlikely. But life is more bizarre than most legal hypothetical questions. The point is that even the most seemingly precise terminology can become fuzzy around the edges. When we condition a death sentence in advance on our answers to questions which may turn out to be close ones in practice, we are not removing either arbitrariness or discretion from the system of choosing punishments.

169. See, e.g., N.Y. Times, Apr. 26, 1967, § 1, at 34, col. 7 (bomb damages home of mother of United States District Court Judge who issued several recent public school integration rulings).


172. *See S. 1, supra note 8, § 111.*
A seventh aggravating factor is the knowing creation of "a grave risk of death" to another person in addition to the murder victim. The risk must occur in the commission of the murder.173 According to the Draft Committee Report, this factor singles out the defendant who displays "a callous disregard for human life, such as one who tossed a hand grenade into a crowd of people[.]"174 Although the example may narrow the meaning of the terms to some extent, this factor is subject to the same criticisms raised above in connection with the list of aggravating circumstances which require imposition of the death penalty on a national security offender.175

But the least clear of all the aggravating factors—as well as the most emotionally charged—is the one providing mandatory death for a murderer who "committed the offense in an especially heinous, cruel, or depraved manner[.]"176 The report's examples, which overlap to some extent, are torture of the victim or intentional subjection of the victim "to prolonged pain or fear[.]"177 Terms like "heinous," "cruel," and "depraved" are almost without directive content.178 The word "heinous" has been used to describe crimes like possession or distribution of small amounts of marijuana or "certain sex acts between consenting adults . . . [which] inflict no significant recognizable harm upon society . . . ."179 It is frequently employed to describe all crimes which might180 or do181 cost the victim his life. At least one state court,

173. Id. § 2401(a)(2)(D).
174. DRAFT COMMITTEE REPORT, supra note 14, at 922.
175. See text accompanying note 127 supra.
176. S. 1, supra note 8, § 2401(a)(2)(E).
177. DRAFT COMMITTEE REPORT, supra note 14, at 922. The report's description of "especially heinous" murders is reminiscent of Albert Camus' description of capital punishment:

... [W]hat is capital punishment if not the most premeditated of murders, to which no criminal act, no matter how calculated, can be compared? If there were to be a real equivalence, the death penalty would have to be pronounced upon a criminal who had forewarned his victim of the very moment he would put him to a horrible death, and who, from that time on, had kept him confined at his own discretion for a period of months. It is not in private life that one meets such monsters.


178. See Browning, supra note 168, at 702.
180. See Wheeler, Toward a Limited Theory of Capital Punishment: An Examination of the Eighth Amendment, 24 STAN. L. REV. 838, 850 (1972). Wheeler observes that "whereas horse-stealing was at one time sensibly considered an heinous crime—one which might well cost the victim his life—that is no longer the case." Thus, Wheeler appears to define a "heinous" crime as one which "might well" cost the victim his life. On this definition, not only all murders but all aggravated assaults and many
after describing a murder and a rape (two separate crimes by the same defendant) as "brutal and heinous," nonetheless strained to interpret the death penalty statute in question as allowing the operation of discretion by the sentencing court and therefore as invalid under Furman.

Perhaps most instructive is the experience of Florida, which hastily passed a new capital punishment statute within months of the Furman decision. The Supreme Court of Florida duly upheld its provisions; among them one leaving the final choice of sentence to the judge, with the jury giving non-binding advice, and another provision listing aggravating and mitigating circumstances similar to those in S. 1. Commenting on the inclusion of "especially heinous, atrocious or cruel" methods of murder in the list of aggravating circumstances, the court observed:

To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard of criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of the jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.

In language similar to the S. 1 Draft Committee Report, the court also rejected the notion that the words were too vague for evenhanded application, even by judges:

[W]e feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. . . . [The terms apply to] additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

(Perhaps most) robberies and muggings are "heinous" crimes. S. 1 provides the death penalty only for "especially heinous" murders. The word "especially" is obviously meant to provide some restraint. But how much?

183. See id. at 441-42.
186. Id. at 8.
187. Id. at 9.
The majority ignored the warnings of dissenting Justice Ervin that "too much discretion still remains in the jury in deciding what recommendation to make and in the trial judge in deciding what sentence to impose." 188

Two years later, in *Slater v. State*, 189 the Florida Supreme Court overturned a death sentence imposed under the new statute on the grounds that it denied "equal justice" to the defendant, an accomplice in a robbery during which another robber killed the victim. The court noted that the "triggerman" had pleaded no contest to a first-degree murder charge and had been sentenced to life imprisonment. The defendant, who had insisted on going to trial, was sentenced to death by the trial judge, despite the jury's eleven-to-one recommendation of life imprisonment. In his written statement of reasons for imposing the death penalty, the trial judge explained that the defendant had "killed a man for $64.88 . . . in an act that was imminently dangerous to an unknown number of people. It was only chance that there was only one man in the room at that time." In order to fulfill the criterion of heinousness, the judge continued, "I don't think you have to have a messy crime. I think it is a heinous and atrocious act to ever threaten a man just to take his money or his property." 190

Despite specific guidance from the state's highest court, the trial judge in *Slater* selected the death penalty, in what appears to have been a drearily ordinary felony-murder, for an accomplice who was not directly responsible for the killing. The judge's written statement of reasons evidences his belief that nearly any violent murder committed in any place where more than one person might well be found would constitute a grave risk of death to someone other than the murder victim. The judge also declared that it is "heinous and atrocious," within the meaning of the capital punishment statute, for any person to threaten another person in hope of pecuniary gain. Under this reading of the supposed standard, all muggers and robbers would deserve the death penalty. 191

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188. *Id.* at 15 (Ervin, J., dissenting).
189. 316 So. 2d 539 (Fla. 1975).
190. *Id.* at 542.
191. A June 1973 Harris poll found that eight percent of those questioned were in favor of an automatic death penalty for all bank robbers; nine percent favored an automatic death sentence for convicted muggers. Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1252 (1974). By comparison, 41 percent approved an automatic death penalty for all killers of policemen or prison guards, 28 percent approved of mandatory capital punishment for all first-degree murderers, 27 percent wanted it for all skyjackers, and 19 percent favored death for all rapists. Vidmar
In reversing the trial judge, the Supreme Court of Florida did not even suggest that there was any discrepancy between the trial judge's reading of the statute and its own reading.\(^{192}\) Instead, it invoked notions of equal protection in ruling that since the triggerman was sentenced to life imprisonment, "equal justice" was denied when the accomplice was sentenced to death. We are left to wonder whether the Florida Supreme Court would have upheld the death penalty for the accomplice if it had been prescribed for the triggerman, despite the accomplice's lack of intentional participation in the murder.\(^{183}\)

It should also be noted that the court's opinion does not criticize or even comment on the trial judge's willingness to withhold the death penalty for a defendant who pleads guilty while imposing it on a less culpable co-defendant who exercises his right to jury trial. Yet nothing in the Florida statute suggests that demanding a trial is to be considered an "aggravating factor" when the time comes to select an appropriate sentence, or that foregoing a trial is to be considered a "mitigating factor." If the statute were so phrased, it would plainly be unconstitutional.\(^{194}\) The fact pattern at least indicates that the trial judge, exercising his discretion, applied the statute in Slater to reward the cooperative defendant and punish the recalcitrant one—regardless of their relative degrees of culpability and regardless of statutory guidelines which had been elaborated at length in the state supreme court's earlier opinion.

The trial jury in the Slater case, instead of acting on "inflamed emotions" as the Florida Supreme Court had in general predicted, responded more calmly than the trial judge. But the most extensive

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\(^{192}\) See Slater v. State, 316 So. 2d 539 (Fla. 1975).

\(^{193}\) The accomplice's culpability in Slater seems roughly comparable to the petitioner's culpability in Furman. If Furman's case was not "extreme," neither was Slater's. See Furman v. Georgia, 408 U.S. 238, 294 (1972) (Brennan, J., concurring).

\(^{194}\) See United States v. Jackson, 390 U.S. 570 (1968) (the fifth amendment right not to plead guilty and the sixth amendment right to jury trial forbid the establishment of a death penalty applicable only to those defendants who assert their right to contest their guilt before a jury); Slater v. State, 316 So. 2d 539, 543 (Fla. 1975) (Crews, C.J., concurring).
study of American juries ever undertaken concluded that neither judges
nor juries exercise their discretion in evenhanded fashion when select-
ing from among the many convicted of capital crimes the few who are to
die. In The American Jury, Professors Kalven and Zeisel reported
on 111 cases in which the judge or the jury found the defendant guilty
of a capital crime and could have imposed a death penalty. In 68
percent of these cases (76 cases), the judge and the jury agreed on
a sentence other than death. In 13 percent (14 cases) the judge
and the jury agreed on the death penalty. In another 13 percent (14
cases) the jury was "lenient," but the judge would have sentenced
the defendant to death. And in six percent (seven cases) the judge
was lenient, but the jury inflicted the death sentence. Thus the judge and
the jury disagreed in nearly one out of five (19 percent) of the
cases. Contrary to the impressions of the Supreme Court of Florida
in State v. Dixon, and in accord with the actual results in Slater v.
State, the judge is more ready to inflict capital punishment (26 per-
cent of the cases) than is the jury (19 percent of the cases).

Kalven and Zeisel initially observed that the cases in which the
judge and jury agree on the death penalty "are marked for the most
part by peculiar heinousness. In many, a clear pattern emerges; there
is an aspect of almost gratuitous violence." Other characteristics are
"patent defenselessness of the victim" and "special ugliness in the tools
of a murder with sexual overtones." Five of the cases involve mul-

196. Id. at 435. The 111 capital cases were drawn from a total sample of 3,576 cases.
Id. at 33.
197. Id. at 436. Kalven and Zeisel's study measured the performance of the jury
against the performance of the judge in each case by comparing the actual decision of the
jury with a report from the trial judge, telling how he would have disposed of that case
had it been tried before him without a jury. Id. at 10.
198. Kalven and Zeisel note that the explanation given by the judge is usually put in
terms of "leniency-disposing factors. Moreover, historically, the problem was developed
as one of making exceptions to the death penalty." Id. at 439 n.10. Compare Black,
supra note 13, at 93:

We tend . . . to think of persons' [sic] being "clearly guilty" of crimes for which
they ought to die. Then some of them, by acts of pure grace, are spared—by prosec-
cutors' discretion, by jury leniency, by clemency. . . .

. . . The inevitable corollary of sparing some people through mere grace or favor
is standardless condemnation of others. The thing that ought to impress us is the
standardless condemnation; we have been looking too long at its mirror image; we
should take courage and turn around.
199. Kalven & Zeisel, supra note 7, at 436.
200. 283 So. 2d 1 (Fla. 1973).
201. 316 So. 2d 539 (Fla. 1975).
203. Id.
tiple victims; three involve brutal physical mistreatment of wholly inno-
cent victims (an elderly couple in one case, an elderly man in another,
a four-and-one-half-year-old child in the third). Some of the other
cases of judge-jury agreement on the death penalty are poignantly
horrible: a man murders his whole family, a defendant refused credit
returns and shoots a 72 year-old grocer in the back, an elderly truck
driver is murdered by a helper who steals the receipts on the driver's
last trip before retirement. If that were all the information available,
it would offer some support for “heinousness” as an aggravating factor
which singles out those killers who most deserve to die. But that is
not all.

Though the cases of judge-jury agreement at first seem to have “a
strong sense of unity” and involve “especially vicious” premeditated
killings, Kalven and Zeisel point out that

some aspects of this viciousness verge so much on the clearly pathologi-
cal that the criterion loses some of its usefulness. Moreover . . . many
of the murder cases in which the judge and jury disagree on the death
penalty appear no less heinous than those in which they agree.204

Once again, discretion is being (or would be) exercised in ways not
predictable from comparisons of the factual situations involved.

In one case a 22 year-old inmate of an institution for defective delin-
quents kills an aged guard without provocation. The judge would have
given the death penalty; the jury was lenient. The jury is also lenient
and the judge stern, with a defendant who killed a woman he claimed
to love, turned himself over to the police asking for immediate execu-
tion, and unsuccessfully pleaded insanity at his trial. But in a third
case, where a defendant shot a gas station owner and his wife to death,
the situation is reversed. The jury gives the death penalty; the judge
would have been lenient, explaining that the defendant was provoked
to fury when the station owner told him, “you damn niggers get the
hell out of here.”205 Kalven and Zeisel comment:

The judge who, unlike the jury, did not respond to the touch of insanity
in the first two cases, does accept this sudden anger as a sufficient reason
for witholding the death penalty. And the jury, sensitive to the
marginal responsibility in the previous cases, is deaf to the wild anger
in this one.206

The overtones of racism in the foregoing case reappear in another form
in a case in which a black defendant kills his lover. The jury is leni-

204. Id. at 438-39 (emphasis added).
205. Id. at 440.
206. Id.
ent. The judge, who would have sentenced to death, suggests that the jury is sympathetic to the defendant's jealousy and adds: "A Negro killing a Negro, that is, the jury did not attach enough importance to the value of a human life due to race." 207

The peculiarities of American sexism also trace a recognizable thread through the cases. A jury convicts a husband and wife of second-degree murder when their beating of their four year-old child causes the child's death; the judge would have given the death penalty. Kalven and Zeisel speculate that in the case of the wife the jury "may have been following its special form of chivalry in not imposing the death penalty on a woman," 208 and may have then treated the partners equally. In another case, a man kills a woman "of poor reputation." The jury is stern, the judge lenient on the grounds that "the victim was herself an underworld character and was guilty at least of keeping company with a person of defendant's reputation . . . ." 209

In two cases the judge would not have sentenced the defendant to death, although the jury did, if the defendant had agreed to a bench rather than a jury trial. As may have been the case with the co-felon in Slater, the judges in these two cases view waiver of jury trial as "a gesture of cooperation warranting withholding the death penalty." 210 Kalven and Zeisel also note that the jury rebels at the felony-murder rule where intent is unclear, both in the child-beating case and in one where (as in Slater v. State) the jury withholds but the judge gives the death penalty to a defendant who is only vicariously responsible for the killing. 211

Summarizing the leniency disposing factors in the cases of judge-jury disagreement, Kalven and Zeisel found two cases in which diminished responsibility was a factor; eight involving provocation, anger, or jealousy; two involving a "worthless victim"; seven involving a felony-murder in which the other felons had not been sentenced to death and

207. Id. at 442.
208. Id. Justice Marshall, concurring in Furman, noted that the death penalty appears to have been employed in a discriminatory fashion not only against Blacks but also against men as compared to women. 408 U.S. at 365. Although statistics collected some years ago indicated that men kill between four and five times more frequently than women (see Wolfgang, supra note 157, at 75), from 1930 to 1968 only 32 women were executed in comparison with 3,827 men. U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, BULL. NO. 45, CAPITAL PUNISHMENT 1930-1968, at 28 (1969).
209. KALVEN & ZEISEL, supra note 7, at 443.
210. Id. at 444.
211. Id. at 443.
four felony-murders in which the defendant was not the killer; two involving a woman defendant; and one in which defense counsel was incompetent (thus disposing the judge to be lenient). As the study's authors note, this list makes the "discretionary allocation" of capital punishment seem somewhat regular, but each time one of the listed factors persuaded one of the deciders (judge or jury) to withhold death, the other was unpersuaded. "Either the judge or the jury was willing, despite the presence of the leniency-disposing factor, to have the defendant executed."

Kalven and Zeisel express a concern for evenhanded justice even after expected procedural reforms are introduced into the sentencing process. As they put it:

In the end the task is one of deciding who, among those convicted of capital crimes, is to die. Whatever the differences on which this decision hinges, they remain demeaningly trivial compared to the stakes. The discretionary use of the death penalty requires a decision which no human should be called upon to make.

At the very least, their study makes it clear that the constellation of factors involved in the choice of sentence is not easily confined by verbal formulations. Even when compressed into one- or two-sentence outlines, the cases discussed above suggest that very delicate shadings of fact, perception, emotion, and bias determine the ultimate results. Judge and jury manipulate the idea of "heinousness" according to standards and beliefs that the law cannot control by statutory prescription—or, probably, at all. But then capital punishment can never be made "mandatory" or discretion channeled so as to remove all arbitrariness in decision-making. We are stuck (as most of us probably suspected) with an imperfect and imperfectable world.215

212. Id. at 445. The list given here does not include all the factors noted by Kalven and Zeisel.
213. Id. at 444.
214. Id. at 448-49 (footnote omitted).
215. See Rosett, Discretion, Severity and Legality in Criminal Justice, 46 S. Cal. L. Rev. 12 (1972). Rosett believes that discretion, defined both as the absence of controlling standards and the opportunity for uncontrolled deviation from any governing norm, is an inevitable part of the criminal justice system because, "not much can be done about the imprecision of words, the need to accommodate to individual circumstances, or the inability to resolve policy differences." Id. at 30. He recommends instead that we ameliorate the system's "tendency to act with greatly differential severity" and to inflict overly severe punishments:

If punishment is less catastrophic it ceases to be an unmentionable dirty word and can be calmly assessed in functional terms... A system in which the formal punishments for crime were less severe might be less dependent on discretionary escapes from its own stated rules.

Id. at 30.
VI.

S. 1 lists five mitigating factors which preclude the imposition of the death sentence on a defendant, regardless of whether the sentencing body has found one or more of the aggravating factors to exist. The factors apply both to national security offenders and murderers. The Draft Committee Report describes them all as circumstances which, though not justifying murder, nonetheless indicate a lesser degree of moral culpability. According to the report, the mitigating factors are deliberately drawn broadly enough to cover every foreseeable factor that might justify prohibiting the imposition of the death penalty in a particular case. At the same time they are specific enough to avoid the wanton and freakish results that the Furman decision stated were unconstitutional.

Only one of the five mitigating factors precludes the exercise of discretion by the sentencing body: the one which forbids the death sentence if the defendant was less than 18 years old at the time of the offense. The other four all involve the complex weighing of factual evidence, and the sorting out of delicate legal differentials, which are the hallmark of discretion.

The first of these four discretionary factors precludes a death sentence for a defendant if, at the time of his otherwise capital offense, his “mental capacity was significantly impaired, although not so impaired, as to constitute a defense to prosecution.” The report describes such a defendant as one who is “legally sane and responsible for his actions” but nonetheless suffers “a significant mental impairment.” The impairment “can be ongoing or chronic, as a result of mental disease or defect, but it need not be.” The report continues:

A particular set of circumstances, such as serious intoxication or a heavy blow upon the head, might well give rise to a sudden mental impairment. As long as this resulted in a “significant” impairment of the defendant’s capacity to appreciate the wrongfulness of his act or conform his conduct to the requirements of the law, he would come within the scope of the provision.
This formulation bears an interesting relationship to S. 1's version of the insanity defense. In essence, S. 1 abolishes the insanity defense as it has been developed over the years by courts and commentators. The statute provides that "mental disease or defect" is a defense only where, as a result of it, the defendant "lacked the state of mind required as an element of the offense charged." Since any defendant found to lack the requisite culpability must be acquitted under accepted principles of criminal law, S. 1 classes the insane with all other defendants in assessing criminal responsibility.

The bill has been sharply criticized for this approach. By contrast, most of the federal appellate courts have adopted a test of insanity substantially the same as that proposed in the Model Penal Code:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality . . . of his conduct or to conform his conduct to the requirements of the law. The italicized phrase is virtually identical with the test for the mitigating factor of "significant mental impairment" as described in the Draft Committee Report. The drafters of S. 1, without openly acknowledging what they are doing, have downgraded the insanity defense as employed by most federal courts to a "mitigating circumstance" which, though it at least forbids the death penalty, nonetheless allows conviction and imprisonment of people we have been accustomed to think of as sick rather than criminal.

Moreover, the history of the insanity defense in the American courts plainly demonstrates that weighing and measuring degrees of mental defect and/or criminal responsibility is extremely difficult. Describ-
ing the jury's role in determining criminal responsibility where the insanity defense has been raised, one federal court implicitly acknowledged that discretion plays a crucial part:

[The jury] measures the extent to which the defendant's mental and emotional processes and behavior controls were impaired at the time of the unlawful act. . . . The second [jury] function is to evaluate that impairment in light of community standards of blameworthiness, to determine whether the defendant's impairment makes it unjust to hold him responsible.229

There simply is no way to insure that like cases are treated in like manner (or arrive at like results) when the jury is assessing such nebulous concepts as "community standards of blameworthiness" or seeking to determine what "justice" requires. These are inevitably matters for the exercise of discretion.

A third mitigating factor under S. 1 is that at the time of the offense, "the defendant was under unusual and substantial duress, although not such duress as would constitute a defense to prosecution[]."230 The wording of the section is somewhat puzzling since S. 1 elsewhere provides that duress, though otherwise an "affirmative defense"231 to prosecution under certain circumstances, is not a defense to prosecution for murder.232 This particular mitigating factor, therefore, applies differently to the national security offenses than it does to murder. In the case of the former, the "duress" involved is obviously less than that which constitutes a successful duress defense. In the case of the latter, there is no question of a successful duress defense and the sentencing body would have to look to the circumstances to determine the amount of duress under the guidelines given in the Draft Committee Report. Presumably the amount of duress which would have sustained a successful duress defense in a national security case should invariably be sufficient to prove "duress" as a mitigating factor in a murder case. But the report does not say. It remarks only that the provision "is


230. S. 1, supra note 8, § 2401(b)(3).
231. S. 1 defines an "affirmative defense" as one the defendant must prove by a preponderance of the evidence. Id. § 111.
232. Id. § 531.
designed to cover those rare situations when a defendant's freedom to refrain from committing the crimes covered by this chapter is clearly limited through reasonable fear for his own or another's safety."\(^{233}\)

The core situation involved is plain enough: the defendant is coerced by threats of imminent serious harm to himself or another. But, as usual, the specific nature of the factor begins to fuzz around the edges. How does the sentencing body distinguish a "reasonable" from an "unreasonable" fear for one's own or another's safety? Should the unusually timid defendant, who genuinely believes threats which appear incredible to the safe and reasonable hindsight of the jury, be a candidate for capital punishment? The determination of what is "reasonable fear" in such cases will almost inevitably turn on the judge's or jury's individual peculiarities: their courage or lack of it, their specific past experiences, their possibly stereotyped notions about how much fear is "reasonable" for men, on the one hand, or women, on the other, to feel in certain circumstances. The history of rape law in America suggests, for example, that many men are completely unable to assess the fear that many women feel when threatened with rape.\(^{234}\) Studies have shown that we are much too willing to accept low-level domestic violence without recognizing that it may well lead to serious violence or even murder.\(^{235}\) Can we, or should we, trust our perceptions of another person's fear to distinguish the capital defendant who deserves to die from one who deserves to live?

A fourth mitigating factor is that "the defendant was an accomplice, the conduct constituting the offense was principally the conduct of another person, and the defendant's participation was relatively minor[]."\(^{236}\) The \textit{Draft Committee Report} leaves no doubt that the determination of such facts is a matter of discretion: "The judgment as to what is relatively minor participation will be made on a case by case basis by the court or jury taking all the relevant facts into consideration."\(^{237}\) The report explains only that a defendant who plans and initiates a murder is not a minor participant even if he does not do the killing himself, and that a defendant "who after killing was prevailed upon to assist in the escape may well be considered under

\(^{233}\) \textit{Draft Committee Report}, \textit{supra} note 14, at 924.


\(^{235}\) \textit{See} Zimring, \textit{The Medium is the Message}, 1 J. Legal Studies 97 (1972); Wolfgang, \textit{supra} note 157.

\(^{236}\) S. 1, \textit{supra} note 8, § 2401(b)(4).

\(^{237}\) \textit{Draft Committee Report}, \textit{supra} note 14, at 924.
all the circumstances to have had only a minor part.”238 By traditional standards of culpability, it should be noted, the latter defendant would not even be guilty of the murder.239 Under S. 1’s definition of accomplice liability, his guilt remains less than certain. The question is whether or not he “knowingly aid[ed] or abet[ted] the commission of the offense,”240 a finding that itself would depend upon the individual facts and circumstances. Given the example of Slater v. State,241 in which the trial judge refused to consider whether the defendant’s participation was minor when he had no direct responsibility for the killing, it appears that arbitrary findings are possible, even likely, under this mitigating factor as well.

The last mitigating factor included in the most recent version of S. 1 is that the defendant “could not reasonably have foreseen that his conduct in the course of the murder for which he was convicted would cause, or would create a grave risk of causing, death to any person.”242 The report’s discussion provides no further illumination.243 Presumably this factor relates only to the second and third kinds of murder as defined in S. 1—felony-murders and murders in which the defendant’s conduct causes a death in circumstances “manifesting extreme indifference to human life.”244 Yet on analysis, it seems almost impossible for this factor to apply to either type of murder. If the circumstances in fact manifest extreme indifference to life, a defendant of ordinary mental capacity245 could hardly fail to foresee that death might result. Defendants who engaged in one of the serious felonies listed in the felony-murder section of S. 1246 could scarcely argue that there was no reasonable possibility of “a grave risk of causing . . . death to any person.” Even if robbers set out with toy guns and not a single genuine weapon among them, they could reasonably foresee that the targets of their attack might be frightened into heart attacks.

238. Id.
239. See, e.g., People v. Barclay, 40 Cal. 2d 146, 252 P.2d 321 (1953); People v. King, 30 Cal. App. 2d 185, 85 P.2d 928 (1938); 54 CAL. Jur. 2d Witnesses § 195, at 643 (assisting defendant after commission of crime does not render the assistant an accomplice; an accessory after the fact, in common-law terminology, is not liable as an accomplice).
240. S. 1, supra note 8, § 401(a)(1).
241. 316 So. 2d 539 (Fla. 1975).
242. S. 1, supra note 8, § 2401(b)(5).
243. See DRAFT COMMITTEE REPORT, supra note 14, at 924.
244. S. 1, supra note 8, §§ 1601(a)(2)-(3).
245. The use of the word “reasonably” indicates that the drafters did not intend the sentencing body to consider mental impairment as a mitigating factor under this section.
246. S. 1, supra note 8, § 1601(a)(3).
or into rash and dangerous behavior. The circumstances in which this mitigating factor would actually come into play would almost certainly be sufficiently peculiar to warrant labeling the sentencing body's decision "arbitrary" regardless of the penalty imposed. At the very least, a court or jury speculating about what a defendant could or could not reasonably have foreseen is deep into uncharted territory and must exercise discretion in order to make its decision.

VII.

The foregoing discussion has focused on the ways in which the death penalty sections of S. 1, through the processes they create and the wording they use, fail to remove either discretion or arbitrariness from the imposition of capital punishment in our legal system. It has been further suggested that no sentencing processes, and no statutory formulations, can ever successfully confine the decision-maker's choice closely enough to justify the death penalty. So far the argument has centered on the judge and the jury, acting as trier of fact, sentencing authority, or judicial arbiter of the legal rules, as inevitable sources of discretion in the sentencing decision. But discretion persists throughout criminal law and procedure. It neither starts nor ends with the judge or jury.

The following discussion expands on the problems of jury discretion and briefly notes many other practices, all of them beyond the reach of the drafters of S. 1, in which discretion operates to preclude the evenhanded allocation of capital punishment to all of those, and only those, whom we could fairly describe as most deserving of society's ultimate sanction. Such practices are cumulative in their effect on the

247. Some courts have held a participant in a felony liable for murder for a killing caused by someone other than another participant in the felony. But see People v. Washington, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965) (disapproving People v. Harrison, 176 Cal. App. 2d 330, 1 Cal. Rptr. 414 (1959)).


A rigid legislative definition of the cases where the sentence should be death has proved to be unworkable in practice, given the infinite variety of circumstances that attend even the heinous crimes. Therefore, it is inevitable that the jury or the court be given power to decide whether the punishment should be imposed. . . . Discretion means, however, that variations are inevitable, depending on the individuals involved, the jury that may be empanelled, the attitude of the press and public and other accidents of time and place. . . . Yet most dramatically when life is at stake, equality is urged to be a most important element of justice.

See generally W. GAYLIN, PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING (1974) (detailing the discrepancy among judges in sentencing and suggesting that personal
imposition of capital punishment. Their product is a system in which
death is inflicted, as Justice Stewart observed, upon a random few.240

Discretion begins with the prosecutor's decision whether or not to
instigate formal charges against a suspect, and, if so, what charge to
bring. The United States Department of Justice has no effective sys-
tem of monitoring discretionary decisions by United States Attorneys
concerning whether or not to prosecute.260 Nor is there any substantial
judicial check on the executive branch's actions. Professor Kenneth
Culp Davis has described the prosecutor's role in selecting which laws
to enforce and against whom to enforce them.

Even though the many prosecuting powers at all levels of government
obviously vary widely in the extent and manner of confining, structuring,
and checking, the major outlines are almost always governed by a single
set of universally accepted assumptions. The principal assumptions are
that the prosecuting power must of course be discretionary, that statutory
provisions as to what enforcement officers "shall" do may be freely vio-
lated without disapproval from the public or from other officials, that
determinations to prosecute or not to prosecute may be made secretly
without any statement of findings or reasons, that such decisions by a
top prosecutor of a city or county or state usually need not be review-
able by any other administrative authority, and that decisions to prose-

249. See Browning, supra note 168, at 661-62; Rosett, Discretion, Severity and
Legality in Criminal Justice, 46 S. CAL. L. Rev. 12, 14-15 (1972). Commenting on
post-Furman state death penalty statutes, many of which are similar to S. 1 in either
listing aggravating and mitigating circumstances or providing allegedly mandatory capital
punishment in certain cases, Browning argues that discretion is not restricted but shifted
to other parts of the criminal justice process. As a result, he predicts, disproportionate
infliction of capital punishment on minorities and poor people will continue.

250. Rabin, Agency Criminal Referrals in the Federal System: An Empirical Study of
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Cute or not to prosecute are not judicially reviewable for abuse of discretion. 251

Even if the prosecutor decides to charge the suspect, he may select a lesser, noncapital charge rather than one which carries a possible death penalty. Under S. 1, where the distinctions between capital punishable national security offenses and lesser transgressions, punishable only by imprisonment, turn on complex verbal formulations and undefined terms, the prosecutor is free to select the greater or lesser charge for any reason or for no reason. 252

Federal courts have specifically approved the use of selective prosecution by the executive branch of government on the basis of "matters of policy wholly apart from any question of probable cause." 253 The Nixon Administration's record of prosecuting political dissidents despite inadequate evidence to support convictions in many cases 254 demonstrates that prosecutorial discretion is in fact exercised on such grounds. But even if federal prosecutors eschew political bias and act entirely on the basis of enlightened common sense, their decisions remain arbitrary, subject to no rule of law. Changing this practice appears practically impossible, as Professor Charles L. Black, Jr. has noted, since "change would require the condition, contrary to fact and to possibility, that we know in advance of trial, or even of charge, of what offense the accused person is actually guilty." 255

The grand jury's ostensible choices in framing an indictment are similar to those which confront the prosecutor in selecting a charge. Most grand juries, of course, look to the prosecutor for guidance in deciding whether and upon what charge to indict. The grand jury is almost wholly dependent on the prosecutor to produce the evidence on which its charge must be based. It almost invariably follows his recommendation. The original theory of the grand jury—that it would provide a community check on the prosecutor's power—has been amply disproved in practice. 256

Plea bargaining is another potential source of arbitrariness in the administration of capital punishment under S. 1. Since up to 90 per-

252. See Browning, supra note 168, at 680-81.
cent of all criminal convictions are obtained on bargained pleas, many prospective capital defendants have been, and will continue to be, removed from the class of candidates for the death penalty by this process. Despite arguments that plea bargaining is unconstitutional, the Supreme Court has approved the practice and even provided some guidance in an attempt to insure that the defendant understands the bargain and that the bargain, once made, is honored. But for the most part, plea bargaining is left to the unfettered discretion of the prosecutor and the defendant's attorney.

The shape that the bargain finally takes—and the prosecutor's decision whether to offer a bargain at all—depends on factors far removed from the accused's moral culpability or the "heinousness" of his alleged offense. The prosecutor usually considers the likelihood of winning his case on the basis of the capital charge. This in turn rests on such variables as the credibility of the available witnesses and the necessity for expert testimony; the amount of public money and time the trial will swallow up; the defendant's past record; and, perhaps, political pressures to bring this particular defendant to public trial, pressures which depend on such factors as his or her notoriety and the general level of public awareness of and outrage at (or sympathy for) the crime or the criminal. If the prosecutor decides not to offer a plea bargain, the defendant has no recourse. He cannot demand judicial review of a decision which may determine, more than any other decision in the interlocking chain from charging through conviction to sentencing, whether or not he will be punished by death.

Once the case goes to trial, it is subject to all the discretionary difficulties of the factfinding and law-applying process. Under S. 1,

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261. Professor Black remarks that although the prosecutor's role in plea bargaining is undoubtedly paramount, the defense attorney's advice as to whether to accept or reject a chance to plead guilty to a noncapital offense also may be crucial. BLACK, supra note 13, at 37-43.
262. See id. at 41.
263. Id. at 42.
though the defendant may be charged with a Class A national security offense or a murder, the jury remains free to convict him or her of a lesser included offense, such as Class B treason or espionage, or manslaughter. The jury may recognize some vaguely defined defense as a justification or mitigation of the defendant's actions. It may even choose to acquit him or her altogether, regardless of whether the evidence is slight or overwhelming. If it does acquit, its decision is not reviewable because of constitutional guarantees against double jeopardy. The history of capital punishment is replete with such instances of jury nullification. As Professor Black commented:

This result, like the decision of the prosecutor to accept a plea of guilty in the plea-bargaining process, sounds good; somebody escapes death. The trouble is that if you turn the coin around, somebody else suffers death because the jury did not find him guilty of a lesser offense rather than of the capital charge. And if the jury's milder verdict may be a function of its sympathies, then its sterner verdict, by inevitable logic, may be a function of its lack of sympathy. And it must be remembered that this alternative, open to the jury, is not effectively controllable, but may mask any amount of purely “discretionary” decision.

Likewise, the jury may, if it wishes, discriminate on the basis of sex or race. It may discriminate on the basis of the defendant's personal characteristics—his or her age, status, looks, occupation, political activity, and so forth. It may choose death or life because it likes or dislikes, not the defendant, but his attorney. There is simply no check on these factors. Yet they seldom, if ever, bear the slightest legitimate relationship to the defendant's ultimate desserts.

Even after trial, verdict, and sentence of death, the legal system continues to offer opportunities for the exercise of often standardless discretion in determining who is to have the sentence carried out and

265. For example, S. 1 establishes two specific defenses to a prosecution for murder. If the accused is charged with knowingly causing the death of another, he may defend on the grounds that circumstances for which he was not responsible caused him to lose his self-control and would be likely to cause an ordinary person to lose his self-control at least to the same extent. S. 1, supra note 8, § 1601(b). If the defendant is charged with a felony-murder, it is an affirmative defense that the death was neither a necessary nor a reasonably foreseeable consequence of the underlying felony or of the particular circumstances in which the felony was committed. Id. § 1601(c).


268. Black, supra note 13, at 47.
who is to escape it. The availability of appellate review and other post-conviction remedies may depend in large part on the defendant's financial resources—not just for court and counsel fees but also for further investigation of his or her case (perhaps in hopes of turning up new evidence) or even for the influencing of public opinion in his or her favor. Despite the limits on appellate review of the death penalty under S. 1, there is considerable room for an appellate court to shade the facts or the law in order to avoid the imposition of capital punishment on any particular defendant. "Clearly erroneous" may sound like an implacable standard, but Supreme Court Justices have been known to disagree as to whether lower courts have committed grave errors or harmless peccadilloes. Like juries, appellate judges suffer from "the natural human tendency to see facts and to evaluate evidence in a manner leading to a desired conclusion . . . ."

Executive clemency offers a final chance for arbitrariness in the allocation of capital punishment. The Constitution grants the President the power to commute death sentences for federal crimes. But it does not place limits on or provide guidelines for the use of that power. Perhaps the best-known application for federal clemency in recent times is that of Julius and Ethel Rosenberg. In retrospect, how satisfied can we be with the result? Students of executive clemency have reported that a wide variety of highly discretionary factors influence the decision in most jurisdictions and that the results are often dis-

269. For a succinct discussion of the ways in which poverty influences the criminal justice process to the detriment of poor defendants see id. at 84-91. Polsby argues that the defendants in Furman, who had the assistance of the NAACP Legal Defense and Educational Fund, Inc., and of Professor Amsterdam, could not claim that they had received inadequate counsel on appeal because of poverty. See Polsby, The Death of Capital Punishment? Furman v. Georgia, 1972 SUPREME COURT REV. 1, 13. His comment ignores the importance of adequate counsel at earlier stages, such as investigation, pretrial, and trial. Polsby also suggests that if there is no way to prevent jury bias against defendants of low social status, "what is wanted is a new world, where worldly advantages do not prove advantageous." Id. What is wanted is a system in which worldly disadvantages do not become one of the determining differences between life and death sentences for criminal defendants of differing wealth but similar culpability.

270. See Browning, supra note 168, at 682-83.
272. See BLACK, supra note 13, at 46.
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criminatory in effect.\textsuperscript{276} There is no reason to believe that federal clemency authority has been or will be exercised with any greater degree of rationality in the process or certainty in the outcome.

VIII.

The persistence of discretion throughout our legal system is inevitable—as inevitable as the persistence of crime. So long as decisions about crime and punishment are made by human beings about other human beings, we will never be able to insure completely against bias, arbitrariness, uncertainty, and mistake. A realistic assessment of our own limitations is an essential component of any societal decision. But nowhere is it more important than when we are attempting to distinguish those who should live from those who must die. As Justice Ervin of the Florida Supreme Court wrote, dissenting in \textit{State v. Dixon}, "All of us have feet of clay, none of us has all-knowing impeccable judgment; none of us can be exemplars of 'holier than thou' in this matter of governmentally prescribing life or death for other citizens."\textsuperscript{277}

The focus of this discussion has somewhat obscured the nature of the national debate over capital punishment. Until the Supreme Court decision in \textit{Furman v. Georgia}\textsuperscript{278} turned public attention to the problems of discretion and arbitrariness, the controversy largely centered on the deterrent effect of the death penalty: does it or doesn't it prevent some of us who would otherwise take the law into our hands from committing violence against others? The statistical evidence against the theory of deterrence seems overwhelming to many scholars of the death penalty.\textsuperscript{279} The evidence in favor of the theory is at best unclear.\textsuperscript{280} Recent studies, which for the first time have claimed to prove that deterrence is a social reality, have been much disputed.\textsuperscript{281} It seems unlikely that the disagreement over deterrence will be settled any time soon.

But if we agree that the death penalty is too awesome and final a sanction to impose unless we have a reasonable assurance that we are

\textsuperscript{276} Wolfgang, Kelly & Nolde, \textit{Comparison of the Executed and the Commuted Among Admissions to Death Row}, 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962).
\textsuperscript{277} 283 So. 2d 1, 22 (1973) (Ervin, J., dissenting).
\textsuperscript{278} 408 U.S. 238 (1972).
\textsuperscript{279} \textit{See} note 168 supra.
doing so only in clear cases, without arbitrariness, without discrimination on the basis of such constitutionally impermissible factors as race, sex, or class, then the foregoing discussion may suggest that we do not have to solve the imponderable riddle of deterrence in order to determine whether it is time at last to end capital punishment in America. Once we have acknowledged that discrimination, arbitrariness, and mistake are inevitable whenever fallible human beings attempt to apply fallible human rules to the infinity of criminal circumstances possible in the real world, we have the answer.