EIGHTH AMENDMENT

FURTHER GUARANTEES IN CRIMINAL CASES

CONTENTS

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EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

EXCESSIVE BAIL

"This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[1] "The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept."[2] These two contrasting views of the "excessive bail" provision, uttered by the Court in the same Term, reflect the ambiguity inherent in the phrase and the absence of evidence regarding the intent of those who drafted and who ratified the Eighth Amendment.[3]

Crucial to understanding why the ambiguity exists if not to its resolution is knowledge of the history of the bail controversy in England.[4] The Statute of Westminster the First of 1275 [5] set forth a detailed enumeration of those offenses which were bailable and

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[1] Stack v. Boyle, 342 U.S. 1, 4 (1951). Note that in Bell v. Wolfish, 441 U.S. 520, 533 (1979), the Court enunciated a narrower view of the presumption of innocence, describing it as "a doctrine that allocates the burden of proof in criminal trials," and denying that it has any "application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."

[2] Carlson v. Landon, 342 U.S. 524, 545 (1952). Justice Black in dissent accused the Court of reducing the provision "below the level of a pious admonition" by saying in effect that "the Amendment does no more than protect a right to bail which Congress can grant and which Congress can take away." Id. at 556.

[3] The only recorded comment of a Member of Congress during debate on adoption of the "excessive bail" provision was that of Mr. Livermore. "The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be judges?" 1 ANNALS OF CONGRESS 754 (1789).

[4] Still the best and most comprehensive treatment is Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 965–89 (1965), *reprinted in* C. FOOTE, STUDIES ON BAIL 181, 187–211 (1966).

[5] 3 Edw. 1, ch. 12.

those which were not, and, though supplemented by later statutes, it served for something like five-and-a-half centuries as the basic authority.[6] *Darnel's Case*,[7] in which the judges permitted the continued imprisonment of persons merely upon the order of the King, without bail, was one of the moving factors in the enactment of the Petition of Right in 1628;[8] the Petition cited Magna Carta as proscribing detention of persons as permitted in *Darnel's Case*. The right to bail was again subverted a half-century later[9] by various technical subterfuges by which petitions for habeas corpus could not be presented, and Parliament reacted by enacting the Habeas Corpus Act of 1679,[10] which established procedures for effectuating release from imprisonment and provided penalties for judges who did not comply with the Act. That avenue closed, the judges then set bail so high it could not be met, and Parliament responded by including in the Bill of Rights of 1689[11] a provision "[t]hat excessive bail ought not to be required." This language, along with essentially the rest of the present Eighth Amendment, was included within the Virginia Declaration of Rights,[12] was picked up in the Virginia recommendations for inclusion in a federal bill of rights by the state ratifying convention,[13] and was introduced verbatim by Madison in the House of Representatives.[14]

Thus, in England the right to bail generally was conferred by the basic 1275 statute, as supplemented, the procedure for assuring access to the right was conferred by the Habeas Corpus Act of 1679, and protection against abridgement through the fixing of an excessive bail was conferred by the Bill of Right of 1689. Habeas corpus was here protected in Article I, § 9, of the Constitution and the question is, therefore, whether the First Congress knowingly or inadvertently provided only against abridgement of a right which they did not confer or protect in itself or whether the phrase "ex-

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[6] 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (London: 1883), 233–43. The statute is summarized at pp. 234–35.

[7] 3 How. St. Tr. 1 (1627).

[8] 3 Charles 1, ch. 1. Debate on the Petition, as precipitated by *Darnel's Case*, is reported in 3 How. St. Tr. 59 (1628). Coke especially tied the requirement that imprisonment be pursuant to a lawful cause reportable on habeas corpus to effectuation of the right to bail. Id. at 69.

[9] Jenkes' Case, 6 How. St. Tr. 1189, 36 Eng. Rep. 518 (1676).

[10] 31 Charles 2, ch. 2. The text is in 2 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 327–340 (Z. Chafee ed., 1951).

[11] I W. & M. 2, ch. 2, clause 10.

[12] 7 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, H. R. DOC. NO. 357, 59th Cong., 2d Sess. 3813 (1909). "Sec. 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[13] 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 658 (2d ed. 1836).

[14] 1 ANNALS OF CONGRESS 438 (1789).

cessive bail" was meant to be a shorthand expression of both rights.

Compounding the ambiguity is a distinctive trend in the United States which had its origin in a provision of the Massachusetts Body of Liberties of 1641,[15] guaranteeing bail to every accused person except those charged with a capital crime or contempt in open court. Copied in several state constitutions,[16] this guarantee was contained in the Northwest Ordinance in 1787,[17] along with a guarantee of moderate fines and against cruel and unusual punishments, and was inserted in the Judiciary Act of 1789,[18] enacted contemporaneously with the passage through Congress of the Bill of Rights. It appears, therefore, that Congress was aware in 1789 that certain language conveyed a right to bail and that certain other language merely protected against one means by which a preexisting right to bail could be abridged.

Long unresolved was the issue of whether "preventive detention"—the denial of bail to an accused, unconvicted defendant because it is feared or it is found probable that if released he will be a danger to the community—is constitutionally permissible. Not until 1984 did Congress authorize preventive detention in federal criminal proceedings.[19]

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[15] "No mans person shall be restrained or imprisoned by any Authority what so ever, before the law hath sentenced him thereto, If he can put in sufficient securtie, bayle, or mainprise, for his appearance, and good behavior in the meane time, unlesse it be in Crimes Capitall, and Contempts in open Court, and in such cases where some expresse act of Court doth allow it." *Reprinted in* 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 79, 82 (Z. Chafee ed., 1951).

[16] "That all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great." 5 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, H. DOC. NO. 357, 59th Congress, 2d sess. 3061 (1909) (Pennsylvania, 1682). The 1776 Pennsylvania constitution contained the same clause in section 28, and in section 29 was a clause guaranteeing against excessive bail. Id. at 3089.

[17] "All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted." Art. II, 32 JOURNALS OF THE CONTINENTAL CONGRESS 334 (1787), reprinted in 1 Stat. 50 n.

[18] "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which case it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion herein. . . ." 1 Stat. 91 § 33 (1789).

[19] Congress first provided for pretrial detention without bail of certain persons and certain classes of persons in the District of Columbia. D.C. Code, §§ 23–1321 et seq., held constitutional in United States v. Edwards, 430 A.2d 1321 (D.C. App. 1981), cert. denied, 455 U.S. 1022 (1982). The law applies only to persons charged with violating statutes applicable exclusively in the District of Columbia, United States v. Thompson, 452 F.2d 1333 (D.C. Cir. 1971), cert. denied, 405 U.S. 998 (1978), while in other federal courts, the Bail Reform Act of 1966, as amended, applies. 80 Stat. 214, 18 U.S.C. §§ 3141–56. Amendments contained in the Bail Reform Act of 1984 added general preventive detention authority. *See* 18 U.S.C. § 3142(d) and (e). Those amendments authorized pretrial detention for persons charged with

The Court first tested and upheld under the Due Process Clause of the Fourteenth Amendment a state statute providing for preventive detention of juveniles.[20] Then, in *United States v. Salerno*,[21] the Court upheld application of preventive detention provisions of the Bail Reform Act of 1984 against facial challenge under the Eighth Amendment. The function of bail, the Court explained, is limited neither to preventing flight of the defendant prior to trial nor to safeguarding a court's role in adjudicating guilt or innocence. "[W]e reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release."[22] Instead, "the only arguable substantive limitation of the Bail Clause is that the government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil."[23] Detention pending trial of "arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel" satisfies this requirement.[24]

Bail is "excessive" in violation of the Eighth Amendment when it is set at a figure higher than an amount reasonably calculated to ensure the asserted governmental interest.[25] If the only asserted interest is to guarantee that the accused will stand trial and submit to sentence if found guilty, then "bail must be set by a court at a sum designed to ensure that goal, and no more."[26] To challenge bail as excessive, one must move for a reduction, and if that motion is denied appeal to the Court of Appeals, and if unsuccessful then to the Supreme Court Justice sitting for that circuit.[27] The Amendment is apparently inapplicable to postconviction release

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certain serious crimes (e.g., crimes of violence, capital crimes, and crimes punishable by 10 or more years' imprisonment) if the court or magistrate finds that no conditions will reasonably assure both the appearance of the person and the safety of others. Detention can also be ordered in other cases where there is a serious risk that the person will flee or that the person will attempt to obstruct justice. Preventive detention laws have also been adopted in some States. Parker v. Roth, 202 Neb. 850, 278 N.W. 2d 106, cert. denied, 444 U.S. 920 (1979).

[20] Schall v. Martin, 467 U.S. 253 (1984).

[21] 481 U.S. 739 (1988).

[22] Id. at 753.

[23] Id. at 754.

[24] Id. at 755. The Court also ruled that there was no violation of due process, the governmental objective being legitimate and there being a number of procedural safeguards (detention applies only to serious crimes, the arrestee is entitled to a prompt hearing, the length of detention is limited, and detainees must be housed apart from criminals).

[25] Stack v. Boyle, 342 U.S. 1, 4–6 (1951).

[26] United States v. Salerno, 481 U.S. at 754.

[27] Id. at 6–7.

pending appeal but the practice has apparently been to grant such releases.[28]

EXCESSIVE FINES

For years the Supreme Court had little to say with reference to excessive fines. In an early case, it held that it had no appellate jurisdiction to revise the sentence of an inferior court, even though the excessiveness of the fines was apparent on the face of the record.[29] In a dissent, Justice Brandeis once contended that the denial of second-class mailing privileges to a newspaper on the basis of its past conduct imposed additional mailing cost, a fine in effect, which, since the costs grew indefinitely each day, was an unusual punishment proscribed by this Amendment.[30] The Court has elected to deal with the issue of fines levied upon indigents, resulting in imprisonment upon inability to pay, in terms of the equal protection clause,[31] thus obviating any necessity to develop the meaning of "excessive fines" as applied to the person sentenced. So too, the Court has held the Clause inapplicable to civil jury awards of punitive damages in cases between private parties, "when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."[32] The Court based this conclusion on a review of the history and purposes of the Excessive Fines Clause. At the time the Eighth Amendment was adopted, the Court noted, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense."[33] The Eighth Amendment itself, as were antecedents of the Clause in the Virginia Declaration of Rights and in the English Bill of Rights of 1689, "clearly was adopted with the particular intent of placing limits on the powers of the new government."[34] Therefore, while leaving open the issues of whether the Clause has any applicability to civil penalties or to *qui tam* actions, the Court determined that "the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government."[35]

The meaning of the phrase as applied to the quantum of punishment for any particular offense, independent of the offender's ability to pay, still awaits litigation.

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[28] Hudson v. Parker, 156 U.S. 277 (1895).
[29] Ex parte Watkins, 32 U.S. (7 Pet.) 568, 574 (1833).
[30] Milwaukee Pub. Co. v. Burleson, 255 U.S. 407, 435 (1921).
[31] Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).
[32] Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257 (1989).
[33] Id. at 265.
[34] Id. at 266.
[35] Id. at 268.

CRUEL AND UNUSUAL PUNISHMENTS

During congressional consideration of this provision one Member objected to "the import of [the words] being too indefinite" and another Member said: "No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it would be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind."[36] It is clear from some of the complaints about the absence of a bill of rights including a guarantee against cruel and unusual punishments in the ratifying conventions that tortures and barbarous punishments were much on the minds of the complainants,[37] but the English history which led to the inclusion of a predecessor provision in the Bill of Rights of 1689 indicates additional concern with arbitrary and disproportionate punishments.[38] Though few in number, the decisions of the Supreme Court interpreting this guarantee have applied it in both senses.

Style of Interpretation.—At first, the Court was inclined to an historical style on interpretation, determining whether or not a punishment was "cruel and unusual" by looking to see if it or a sufficiently similar variant was considered "cruel and unusual" in

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[36] 1 ANNALS OF CONGRESS 754 (1789).

[37] E.g., 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 111 (2d ed. 1836); 3 id. at 447–52.

[38] *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839 (1969). Disproportionality, in any event, was utilized by the Court in Weems v. United States, 217 U.S. 349 (1910). It is not clear what, if anything, the word "unusual" adds to the concept of "cruelty" (but see Furman v. Georgia, 408 U.S. 238, 276 n.20 (1972) (Justice Brennan concurring)), although it may have figured in *Weems*, 217 U.S. at 377, and in Trop v. Dulles, 356 U.S. 86, 100 n. 32 (1958) (plurality opinion), and it did figure in Harmelin v. Michigan, 501 U.S. 957, 994–95 (1991) ("severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history").

1789.[39] But in *Weems v. United States*[40] it was concluded that the framers had not merely intended to bar the reinstitution of procedures and techniques condemned in 1789, but had intended to prevent the authorization of "a coercive cruelty being exercised through other forms of punishment." The Amendment therefore was of an "expansive and vital character"[41] and, in the words of a later Court, "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[42] The proper approach to an interpretation of this provision has been one of the major points of difference among the Justices in the capital punishment cases.[43]

"Cruel and Unusual Punishments".—"Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture [such as drawing and quartering, embowelling alive, beheading, public dissecting, and burning alive], and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution."[44] In thus upholding capital punishment inflicted by a firing squad, the Court not only looked to traditional practices but examined the history of executions in the territory concerned, the military practice, and current writings on the death penalty.[45] The Court next approved, under the Fourteenth Amendment's due process clause rather than under the Eighth Amendment, electrocution as a permissible method of administering punishment.[46] Many years later, a divided Court, assuming the applicability of the Eighth Amendment to the States, held that a second electrocution following a mechanical failure at

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[39] Wilkerson v. Utah, 99 U.S. 130 (1878); In re Kemmler, 136 U.S. 436 (1890); *cf.* Weems v. United States, 217 U.S. 349, 368–72 (1910). On the present Court, Chief Justice Rehnquist subscribes to this view (see, e.g., Woodson v. North Carolina, 428 U.S. 280, 208 (dissenting)), and the views of Justices Scalia and Thomas appear to be similar. See, e.g., Harmelin v. Michigan, 501 U.S. 957, 966–90 (1991) (Justice Scalia announcing judgment of Court) (relying on original understanding of Amendment and of English practice to argue that there is no proportionality principle in non-capital cases); and Hudson v. McMillian, 112 S. Ct. 995, 1010 (1992) (Justice Thomas dissenting) (objecting to Court's extension of the Amendment "beyond all bounds of history and precedent" in holding that "significant injury" need not be established for sadistic and malicious beating of shackled prisoner to constitute cruel and unusual punishment).

[40] 217 U.S. 349 (1910).

[41] Id. at 376–77.

[42] Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion).

[43] *See* Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978).

[44] Wilkerson v. Utah, 99 U.S. 130, 135 (1878).

[45] Id. *See also* Pervear v. Commonwealth, 72 U.S. (5 Wall.) 475, 479–80 (1867).

[46] In re Kemmler, 136 U.S. 436 (1890).

the first which injured but did not kill the condemned man did not violate the proscription.[47]

Divestiture of the citizenship of a natural born citizen was held in *Trop v. Dulles*,[48] again by a divided Court, to be constitutionally forbidden as a penalty more cruel and "more primitive than torture," inasmuch as it entailed statelessness or "the total destruction of the individual's status in organized society." "The question is whether [a] penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment." A punishment must be examined "in light of the basic prohibition against inhuman treatment," and the Amendment was intended to preserve the "basic concept . . . [of] the dignity of man" by assuring that the power to impose punishment is "exercised within the limits of civilized standards."[49]

Capital Punishment.—In *Trop*, the majority refused to consider "the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment . . . the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.[50] But a coalition of civil rights and civil liberties organizations mounted a campaign against the death penalty in the 1960s, and the Court eventually confronted the issues involved. The answers were not, it is fair to say, consistent one with another.

A series of cases testing the means by which the death penalty was imposed[51] culminated in what appeared to be a decisive rejec-

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[47] Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947). Justice Frankfurter tested the issue by due process standards. Id. at 470 (concurring).

[48] 356 U.S. 86 (1958). Four Justices joined the plurality opinion while Justice Brennan concurred on the ground that the requisite relation between the severity of the penalty and legitimate purpose under the war power was not apparent. Id. at 114. Four Justices dissented, denying that denationalization was a punishment and arguing that instead it was merely a means by which Congress regulated discipline in the armed forces. Id. at 121, 124–27.

[49] Id. at 99–100.

[50] Id. at 99. In Rudolph v. Alabama, 375 U.S. 889 (1963), Justices Goldberg, Douglas, and Brennan, dissenting from a denial of certiorari, argued that the Court should have heard the case to consider whether the Constitution permitted the imposition of death "on a convicted rapist who has neither taken nor endangered human life," and presented a line of argument questioning the general validity of the death penalty under the Eighth Amendment.

[51] E.g., Witherspoon v. Illinois, 391 U.S. 510 (1968) (exclusion of death-scrupled jurors). *See also* Davis v. Georgia, 429 U.S. 122 (1976), and Adams v. Texas, 448 U.S. 38 (1980) (explicating *Witherspoon*). The Eighth Amendment was the basis for grant of review in Boykin v. Alabama, 395 U.S. 238 (1969) and Maxwell v. Bishop, 398 U.S. 262 (1970), but membership changes on the Court resulted in decisions on other grounds.

tion of the attack in *McGautha v. California*.[52] Nonetheless, the Court then agreed to hear a series of cases directly raising the question of the validity of capital punishment under the cruel and unusual punishments clause, and, to considerable surprise, the Court held in *Furman v. Georgia*[53] that the death penalty, at least as administered, did violate the Eighth Amendment. There was no unifying opinion of the Court in *Furman*; the five Justices in the majority each approached the matter from a different angle in a separate concurring opinion. Two Justices concluded that the death penalty per se was "cruel and unusual" because the imposition of capital punishment "does not comport with human dignity"[54] or because it is "morally unacceptable" and "excessive."[55] One Justice concluded that because death is a penalty inflicted on the poor and hapless defendant but not the affluent and socially better defendant, it violates the implicit requirement of equality of treatment found within the Eighth Amendment.[56] Two Justices concluded that capital punishment was both "cruel" and "unusual" because it was applied in an arbitrary, "wanton," and "freakish" manner[57] and so infrequently that it served no justifying end.[58]

Inasmuch as only two of the *Furman* Justices thought the death penalty to be invalid in all circumstances, those who wished to reinstate the penalty concentrated upon drafting statutes that would correct the faults identified in the other three majority opin-

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[52] 402 U.S. 183 (1971). *McGautha* was decided in the same opinion with *Crampton v. Ohio*. *McGautha* raised the question whether provision for imposition of the death penalty without legislative guidance to the sentencing authority in the form of standards violated the due process clause; *Crampton* raised the question whether due process was violated when both the issue of guilt or innocence and the issue of whether to impose the death penalty were determined in a unitary proceeding. Justice Harlan for the Court held that standards were not required because, ultimately, it was impossible to define with any degree of specificity which defendant should live and which die; while bifurcated proceedings might be desirable, they were not required by due process.

[53] 408 U.S. 238 (1972). The change in the Court's approach was occasioned by the shift of Justices Stewart and White, who had voted with the majority in *McGautha*.

[54] Id. at 257 (Justice Brennan).

[55] Id. at 314 (Justice Marshall).

[56] Id. at 240 (Justice Douglas).

[57] Id. at 306 (Justice Stewart).

[58] Id. at 310 (Justice White). The four dissenters, in four separate opinions, argued with different emphases that the Constitution itself recognized capital punishment in the Fifth and Fourteenth Amendments, that the death penalty was not "cruel and unusual" when the Eighth and Fourteenth Amendments were proposed and ratified, that the Court was engaging in a legislative act to strike it down now, and that even under modern standards it could not be considered "cruel and unusual." Id. at 375 (Chief Justice Burger), 405 (Justice Blackmun), 414 (Justice Powell), 465 (Justice Rehnquist). Each of the dissenters joined each of the opinions of the others.

ions.[59] Enactment of death penalty statutes by 35 States following *Furman* led to renewed litigation, but not to the elucidation one might expect from a series of opinions.[60] Instead, while the Court seemed firmly on the path to the conclusion that only criminal acts that result in the deliberate taking of human life may be punished by the state's taking of human life,[61] it chose several different paths in attempting to delineate the acceptable procedural devices that must be instituted in order that death may be constitutionally pronounced and carried out. To summarize, the Court determined that the penalty of death for deliberate murder is not *per se* cruel and unusual, but that mandatory death statutes leaving the jury or trial judge no discretion to consider the individual defendant and his crime are cruel and unusual, and that standards and procedures may be established for the imposition of death that would remove or mitigate the arbitrariness and irrationality found so significant in *Furman*.[62] Divisions among the Justices, however, made it difficult to ascertain the form which permissible statutory schemes may take.[63]

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[59] Collectors of judicial "put downs" of colleagues should note Justice Rehnquist's characterization of the many expressions of faults in the system and their correction as "glossolalial." Woodson v. North Carolina, 428 U.S. 280, 317 (1976) (dissenting).

[60] Justice Frankfurter once wrote of the development of the law through "the process of litigating elucidation." International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958). The Justices are firm in declaring that the series of death penalty cases failed to conform to this concept. *See, e.g.*, Chief Justice Burger, Lockett v. Ohio, 438 U.S. 586, 602 (1978) (plurality opinion) ("The signals from this Court have not . . . always been easy to decipher"); Justice White, id. at 622 ("The Court has now completed its about-face since *Furman*") (concurring in result); and Justice Rehnquist, id. at 629 (dissenting) ("the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed"), and id. at 632 ("I am frank to say that I am uncertain whether today's opinion represents the seminal case in the exposition by this Court of the Eighth and Fourteenth Amendments as they apply to capital punishment, or whether instead it represents the third false start in this direction within the past six years").

[61] On crimes not involving the taking of life or the actual commission of the killing by a defendant, *see* Coker v. Georgia, 433 U.S. 584 (1977) (rape); Enmund v. Florida, 458 U.S. 782 (1982) (felony murder committed by confederate). Those cases in which a large threat, though uneventuated, to the lives of many may have been present, as in airplane hijackings, may constitute an exception to the Court's narrowing of the crimes for which capital punishment may be imposed. The federal hijacking law, 49 U.S.C. § 1472, imposes death only when death occurs during commission of the hijacking. But the treason statute does not require a death to occur and represents a situation in which great and fatal danger might be presented. 18 U.S.C. § 2381.

[62] Justices Brennan and Marshall adhered to the view that the death penalty is per se unconstitutional. E.g., Coker v. Georgia, 433 U.S. 584, 600 (1977); Lockett v. Ohio, 438 U.S. 586, 619 (1978); Enmund v. Florida, 458 U.S. 782, 801 (1982).

[63] A comprehensive evaluation of the multiple approaches followed in *Furman*-era cases may be found in Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978).

Inasmuch as the three Justices in the majority in *Furman* who did not altogether reject the death penalty thought the problems with the system revolved about discriminatory and arbitrary imposition,[64] legislatures turned to enactment of statutes that purported to do away with these difficulties by, on the one hand, providing for automatic imposition of the death penalty upon conviction for certain forms of murder, or, more commonly, providing specified aggravating and mitigating factors that the sentencing authority should consider in imposing sentence, and establishing special procedures to follow in capital cases. In five cases in 1976, the Court rejected automatic sentencing but approved other statutes specifying factors for jury consideration.[65]

First, the Court concluded that the death penalty as a punishment for murder does not itself constitute cruel and unusual punishment. While there were differences of degree among the seven Justices in the majority on this point, they all seemed to concur in the position that reenactment of capital punishment statutes by 35 States precluded the Court from concluding that this form of penalty was no longer acceptable to a majority of the American people; rather, they concluded, a large proportion of American society continued to regard it as an appropriate and necessary criminal sanction. Neither is it possible, the Court continued, for it to decide that the death penalty does not comport with the basic concept of human dignity at the core of the Eighth Amendment. Courts are not free to substitute their own judgments for the people and their elected representatives. A death penalty statute, just as all other statutes, comes before the courts bearing a presumption of validity which can only be overcome upon a strong showing by those who attack its constitutionality. Whether in fact the death penalty validly serves the permissible functions of retribution and deterrence,

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[64] Thus, Justice Douglas thought the penalty had been applied discriminatorily, Furman v. Georgia, 408 U.S. 238 (1972), Justice Stewart thought it had been applied in an arbitrary, "wanton," and "freakish" manner id. at 310, and Justice White thought it had been applied so infrequently that it served no justifying end. Id. at 313.

[65] The principal opinion was in Gregg v. Georgia, 428 U.S. 153 (1976) (upholding statute providing for a bifurcated proceeding separating the guilt and sentencing phases, requiring the jury to find at least one of ten statutory aggravating factors before imposing death, and providing for review of death sentences by the Georgia Supreme Court). Statutes of two other States were similarly sustained, Proffitt v. Florida, 428 U.S. 242 (1976) (statute generally similar to Georgia's, with the exception that the trial judge, rather than jury, was directed to weigh statutory aggravating factors against statutory mitigating factors), and Jurek v. Texas, 428 U.S. 262 (1976) (statute construed as narrowing death-eligible class, and lumping mitigating factors into consideration of future dangerousness), while those of two other States were invalidated, Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976) (both mandating death penalty for first-degree murder).

the judgments of the state legislatures are that it does, and those judgments are entitled to deference. Therefore, the infliction of death as a punishment for murder is not without justification and is not unconstitutionally severe. Neither is the punishment of death disproportionate to the crime being punished, murder.[66]

Second, a different majority, however, concluded that statutes mandating the imposition of death for crimes classified as first-degree murder violate the Eighth Amendment. In order to make its determination, the plurality looked to history and traditional usage, to legislative enactment, and to jury determinations. Because death is a unique punishment, the sentencing process must provide an opportunity for individual consideration of the character and record of each convicted defendant and his crime along with mitigating and aggravating circumstances.[67]

Third, while the imposition of death is constitutional per se, the procedure by which sentence is passed must be so structured as to reduce arbitrariness and capriciousness as much as possible.[68] What emerged from the prevailing plurality opinion in these cases are requirements (1) that the sentencing authority, jury or judge,[69] be given standards to govern its exercise of discretion and be given the opportunity to evaluate both the circumstances of

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[66] Gregg v. Georgia, 428 U.S. 153, 168–87 (1976) (Justices Stewart, Powell, and Stevens); Roberts v. Louisiana, 428 U.S. 325, 350–56 (1976) (Justices White, Blackmun, Rehnquist, and Chief Justice Burger). The views summarized in the text are those in the Stewart opinion in *Gregg*. Justice White's opinion basically agrees with this opinion in concluding that contemporary community sentiment accepts capital punishment, but did not endorse the proportionality analysis. Justice White's *Furman* dissent and those of Chief Justice Burger and Justice Blackmun show a rejection of proportionality analysis. Justices Brennan and Marshall dissented, reiterating their *Furman* views. *Gregg*, supra, at 227, 231.

[67] Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). Justices Stewart, Powell, and Stevens composed the plurality, and Justices Brennan and Marshall concurred on the basis of their own views of the death penalty. 428 U.S. at 305, 306, 336.

[68] Here adopted is the constitutional analysis of the Stewart plurality of three. "[T]he holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds," Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976), a comment directed to the *Furman* opinions but equally applicable to these cases and to *Lockett*. *See* Marks v. United States, 430 U.S. 188, 192–94 (1977).

[69] The Stewart plurality noted its belief that jury sentencing in capital cases performs an important societal function in maintaining a link between contemporary community values and the penal system, but agreed that sentencing may constitutionally be vested in the trial judge. Gregg v. Georgia, 428 U.S. 153, 190 (1976). A definitive ruling came in Spaziano v. Florida, 468 U.S. 447 (1984), upholding a provision under which the judge can override a jury's advisory life imprisonment sentence and impose the death sentence. "[T]he purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge." Id. at 462–63.

the offense and the character and propensities of the accused;[70] (2) that to prevent jury prejudice on the issue of guilt there be a separate proceeding after conviction at which evidence relevant to the sentence, mitigating and aggravating, will be presented;[71] (3) that special forms of appellate review be provided not only of the conviction but also of the sentence, to ascertain that the sentence was in fact fairly imposed both on the facts of the individual case and by comparison with the penalties imposed in similar cases.[72] The Court later ruled, however, that proportionality review is not constitutionally required.[73] *Gregg*, *Proffitt*, and *Jurek* did not require such comparative proportionality review, the Court noted, but merely suggested that proportionality review is one means by which a state may "safeguard against arbitrarily imposed death sentences."[74]

Most states responded to the requirement that the sentencing authority be given standards narrowing discretion to impose the death penalty by enacting statutes spelling out "aggravating" circumstances at least one of which must be found to be present before the death penalty may be imposed. The standards must be rel-

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[70] Gregg v. Georgia, 428 U.S. 153, 188–95 (1976). Justice White seemed close to the plurality on the question of standards, id. at 207 (concurring), but while Chief Justice Burger and Justice Rehnquist joined the White opinion "agreeing" that the system under review "comports" with *Furman*, Justice Rehnquist denied the constitutional requirement of standards in any event. Woodson v. North Carolina, 428 U.S. 280, 319–21 (1976) (dissenting). In McGautha v. California, 402 U.S. 183, 207–08 (1971), the Court had rejected the argument that the absence of standards violated the due process clause. On the vitiation of *McGautha*, see *Gregg*, supra, at 195 n.47, and Lockett v. Ohio, 438 U.S. 586, 598–99 (1978). In assessing the character and record of the defendant, the jury may be required to make a judgment about the possibility of future dangerousness of the defendant, from psychiatric and other evidence. Jurek v. Texas, 428 U.S. 262, 275–76 (1976). Moreover, testimony of psychiatrists need not be based on examination of the defendant; general responses to hypothetical questions may also be admitted. Barefoot v. Estelle, 463 U.S. 880 (1983). *But cf.* Estelle v. Smith, 451 U.S. 454 (1981) (holding self-incrimination and counsel clauses applicable to psychiatric examination, at least when doctor testifies about his conclusions with respect to future dangerousness).

[71] Gregg v. Georgia, 428 U.S. 153, 163, 190–92, 195 (1976) (plurality opinion). McGautha v. California, 402 U.S. 183 (1971), had rejected a due process requirement of bifurcated trials, and the *Gregg* plurality did not expressly *require* it under the Eighth Amendment. But the plurality's emphasis upon avoidance of arbitrary and capricious sentencing by juries seems to look inevitably toward bifurcation. The dissenters in Roberts v. Louisiana, 428 U.S. 325, 358 (1976), rejected bifurcation and viewed the plurality as requiring it. All states with post-*Furman* capital sentencing statutes took the cue by adopting bifurcated capital sentencing procedures, and the Court has not been faced with the issue again. *See* Raymond J. Pascucci, et al., Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1224–25 (1984).

[72] Gregg v. Georgia, 428 U.S. 153, 195, 198 (1976) (plurality); Proffitt v. Florida, 428 U.S. 242, 250–51, 253 (1976) (plurality); Jurek v. Texas, 428 U.S. 262, 276 (1976) (plurality).

[73] Pulley v. Harris, 465 U.S. 37 (1984).

[74] Id. at 50.

atively precise and instructive in providing guidance that minimizes the risk of arbitrary and capricious action by the sentencer, the desired result being a principled way to distinguish cases in which the death penalty is imposed from other cases in which it is not. Thus, the Court invalidated a capital sentence based upon a jury finding that the murder was "outrageously or wantonly vile, horrible, and inhuman," reasoning that "a person of ordinary sensibility could fairly [so] characterize almost every murder."[75] Similarly, an "especially heinous, atrocious or cruel" aggravating circumstance was held to be unconstitutionally vague.[76] The "especially heinous, cruel or depraved" standard is cured, however, by a narrowing interpretation requiring a finding of infliction of mental anguish or physical abuse before the victim's death.[77]

The proscription against a mandatory death penalty has also received elaboration. The Court invalidated statutes making death the mandatory sentence for persons convicted of first-degree murder of a police officer,[78] and for prison inmates convicted of murder while serving a life sentence without possibility of parole.[79] On the other hand, if actual sentencing authority is conferred on the trial judge, it is not unconstitutional for a statute to require a jury to return a death "sentence" upon convicting for specified crimes.[80] Flaws related to those attributed to mandatory sentencing statutes were found in a state's structuring of its capital system to deny the jury the option of convicting on a lesser included offense, when that would be justified by the evidence.[81] Because the jury had to

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[75] Godfrey v. Georgia, 446 U.S. 420, 428–29 (1980) (plurality opinion).

[76] Maynard v. Cartwright, 486 U.S. 356 (1988).

[77] Walton v. Arizona, 497 U.S. 639 (1990). *Accord*, Lewis v. Jeffers, 497 U.S. 764 (1990). *See also* Gregg v. Georgia, 428 U.S. 153, 201 (1976) (upholding full statutory circumstance of "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"); Proffitt v. Florida, 428 U.S. 242, 255 (1976) (upholding "especially heinous, atrocious or cruel" aggravating circumstance as interpreted to include only "the conscienceless or pitiless crime which is unnecessarily torturous to the victim"); Sochor v. Florida, 112 S. Ct. 2114 (1992) (impermissible vagueness of "heinousness" factor cured by narrowing interpretation including strangulation of a conscious victim).

[78] Roberts v. Louisiana, 431 U.S. 633 (1977) (per curiam) (involving a different defendant than the first *Roberts v. Louisiana* case, supra n.67).

[79] Sumner v. Shuman, 483 U.S. 66 (1987).

[80] Baldwin v. Alabama, 472 U.S. 372 (1985) (mandatory jury death sentence saved by requirement that trial judge independently weigh aggravating and mitigating factors and determine sentence).

[81] Beck v. Alabama, 447 U.S. 625 (1980). The statute made the guilt determination "depend . . . on the jury's feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision on this issue." Id. at 640. *Cf.* Hopper v. Evans, 456 U.S. 605 (1982). No such constitutional infirmity is present, however, if failure to instruct on lesser included offenses is due to the defendant's refusal to waive the statute of limitations for those lesser offenses. Spaziano v. Florida, 468 U.S. 447 (1984). *See also* Schad v. Arizona, 501 U.S. 624 (1991) (first-degree murder defendant, who received instruction on lesser

choose between conviction or acquittal, the statute created the risk that the jury would convict because it felt the defendant deserved to be punished or acquit because it believed death was too severe for the particular crime, when at that stage the jury should concentrate on determining whether the prosecution had proved defendant's guilt beyond a reasonable doubt.[82]

The overarching principle of *Furman* and of the *Gregg* series of cases was that the jury should not be "without guidance or direction" in deciding whether a convicted defendant should live or die. The jury's attention was statutorily "directed to the specific circumstances of the crime . . . and on the characteristics of the person who committed the crime."[83] Discretion was channeled and rationalized. But in *Lockett v. Ohio*,[84] a Court plurality determined that a state law was invalid because it prevented the sentencer from giving weight to any mitigating factors other than those specified in the law. In other words, the jury's discretion was curbed too much. "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[85] Similarly, the reason that a three-justice plurality viewed North Carolina's mandatory death sentence for persons convicted of first degree murder as invalid was that it failed "to allow the particularized consideration of relevant aspects

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included offense of second-degree murder, was not entitled to a jury instruction on the lesser included offense of robbery). In *Schad* the Court also upheld Arizona's characterization of first-degree murder as a single crime encompassing two alternatives, premeditated murder and felony-murder, and not requiring jury agreement on which alternative had occurred.

[82] Also impermissible as distorting a jury's role are prosecutor's comments or jury instructions that mislead a jury as to its primary responsibility for deciding whether to impose the death penalty. *Compare* Caldwell v. Mississippi, 472 U.S. 320 (1985) (jury's responsibility is undermined by court-sanctioned remarks by prosecutor that jury's decision is not final, but is subject to appellate review) *with* California v. Ramos, 463 U.S. 992 (1983) (jury responsibility not undermined by instruction that governor has power to reduce sentence of life imprisonment without parole). *See also* Lowenfield v. Phelps, 484 U.S. 231 (1988) (poll of jury and supplemental jury instruction on obligation to consult and attempt to reach a verdict was not unduly coercive on death sentence issue, even though consequence of failing to reach a verdict was automatic imposition of life sentence without parole).

[83] Gregg v. Georgia, 428 U.S. 153, 197–98 (1976) (plurality).

[84] 438 U.S. 586 (1978). The plurality opinion by Chief Justice Burger was joined by Justices Stewart, Powell, and Stevens. Justices Blackmun, Marshall, and White concurred in the result on separate and conflicting grounds. Id. at 613, 619, 621. Justice Rehnquist dissented. Id. at 628.

[85] 438 U.S. at 604 (plurality).

of the character and record of each convicted defendant."[86] *Lockett* and *Woodson* have since been endorsed by a Court majority.[87] Thus, a great measure of discretion was again accorded the sentencing authority, be it judge or jury, subject only to the consideration that the legislature must prescribe aggravating factors.[88]

The Court has explained this apparent contradiction as constituting recognition "that 'individual culpability is not always measured by the category of crime committed,'"[89] and as the product of an attempt to pursue the "twin objectives" of "measured, consistent application" of the death penalty and "fairness to the accused."[90] The requirement that aggravating circumstances be spelled out by statute serves a narrowing purpose that helps consistency of application; absence of restriction on mitigating evidence helps promote fairness to the accused through an "individualized" consideration of his circumstances. In the Court's words,

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[86] Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (opinion of Justice Stewart, joined by Justices Powell and Stevens). *Accord*, Roberts v. Louisiana, 428 U.S. 325 (1976) (statute mandating death penalty for five categories of homicide constituting first-degree murder).

[87] Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (adopting *Lockett*); Sumner v. Shuman, 483 U.S. 66 (1987) (adopting *Woodson*). The majority in *Eddings* was composed of Justices Powell, Brennan, Marshall, Stevens, and O'Connor; Chief Justice Burger and Justices White, Blackmun, and Rehnquist dissented. The *Shuman* majority was composed of Justices Blackmun, Brennan, Marshall, Powell, Stevens, and O'Connor; dissenting were Justices White and Scalia and Chief Justice Rehnquist. *Woodson* and the first *Roberts v. Louisiana* had earlier been followed in the second Roberts v. Louisiana, 431 U.S. 633 (1977), a *per curiam* opinion from which Chief Justice Burger, and Justices Blackmun, White, and Rehnquist dissented.

[88] Justice White, dissenting in *Lockett* from the Court's holding on consideration of mitigating factors, wrote that he "greatly fear[ed] that the effect of the Court's decision today will be to compel constitutionally a restoration of the state of affairs at the time *Furman* was decided, where the death penalty is imposed so erratically and the threat of execution is so attenuated for even the most atrocious murders that 'its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.'" 438 U.S. at 623. More recently, Justice Scalia voiced similar misgivings. "Shortly after introducing our doctrine *requiring* constraints on the sentencer's discretion to 'impose' the death penalty, the Court began developing a doctrine *forbidding* constraints on the sentencer's discretion to '*decline* to impose' it. This second doctrine—counterdoctrine would be a better word—has completely exploded whatever coherence the notion of 'guided discretion' once had. . . . In short, the practice which in *Furman* had been described as the discretion to sentence to death and pronounced constitutionally prohibited, was in *Woodson* and *Lockett* renamed the discretion not to sentence to death and pronounced constitutionally required." Walton v. Arizona, 497 U.S. 639, 661–62 (1990) (concurring in the judgment). For a critique of these criticisms of *Lockett*, *see* Scott E. Sundby, *The* Lockett *Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).

[89] Roberts v. Louisiana, 428 U.S. 325, 333 (1976) (plurality opinion of Justices Stewart, Powell, and Stevens) (quoting Furman v. Georgia, 408 U.S. 238, 402 (1972) (Chief Justice Burger dissenting)).

[90] Eddings v. Oklahoma, 455 U.S. 104, 110–11 (1982).

statutory aggravating circumstances "play a constitutionally necessary function at the stage of legislative definition [by] circumscrib[ing] the class of persons eligible for the death penalty,"[91] while consideration of all mitigating evidence requires focus on "'the character and record of the individual offender and the circumstances of the particular offense'" consistent with "'the fundamental respect for humanity underlying the Eighth Amendment.'"[92] As long as the defendant's crime falls within the statutorily narrowed class, the jury may then conduct "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime."[93]

So far, the Justices who favor abandonment of the *Lockett* and *Woodson* approach have not prevailed. The Court has, however, given states greater leeway in fashioning procedural rules that have the effect of controlling how juries may use mitigating evidence that must be admitted and considered. States may also cure some constitutional errors on appeal through operation of "harmless error" rules and reweighing of evidence by the appellate court. Also, the Court has constrained the use of federal habeas corpus to review state court judgments. As a result of these trends, the Court recognizes a significant degree of state autonomy in capital sentencing in spite of its rulings on substantive Eighth Amendment law.

While holding fast to the *Lockett* requirement that sentencers be allowed to consider all mitigating evidence,[94] the Court has upheld state statutes that control the relative weight that the sentencer may accord to aggravating and mitigating evidence.[95]

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[91] Zant v. Stephens, 462 U.S. 862, 878 (1983). This narrowing function may be served at the sentencing phase or at the guilt phase; the fact that an aggravating circumstance justifying capital punishment duplicates an element of the offense of first-degree murder does not render the procedure invalid. Lowenfield v. Phelps, 484 U.S. 231 (1988).

[92] Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion)).

[93] Zant v. Stephens, 462 U.S. 862, 879 (1983).

[94] *See, e.g.*, Hitchcock v. Dugger, 481 U.S. 393 (1987) (instruction limiting jury to consideration of mitigating factors specifically enumerated in statute is invalid); Penry v. Lynaugh, 492 U.S. 302 (1989) (jury must be permitted to give effect to defendant's evidence of mental retardation and abused background); Skipper v. South Carolina, 476 U.S. 1 (1986) (exclusion of evidence of defendant's good conduct in jail denied defendant his *Lockett* right to introduce all mitigating evidence). *But cf.* Franklin v. Lynaugh, 487 U.S. 164 (1988) (consideration of defendant's character as revealed by jail behavior may be limited to context of assessment of future dangerousness).

[95] "Neither [*Lockett* nor *Eddings*] establishes the weight which must be given to any particular mitigating evidence, or the manner in which it must be considered; they simply condemn any procedure in which such evidence has no weight at all." Barclay v. Florida, 463 U.S. 939, 961 n.2 (1983) (Justice Stevens concurring in judgment).

"The requirement of individualized sentencing is satisfied by allowing the jury to consider all relevant mitigating evidence"; there is no additional requirement that the jury be allowed to weigh the severity of an aggravating circumstance in the absence of any mitigating factor.[96] So too, the legislature may specify the consequences of the jury's finding an aggravating circumstance; it may mandate that a death sentence be imposed if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance,[97] or if the jury finds that aggravating circumstances outweigh mitigating circumstances.[98] And a court may instruct that the jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling," since in essence the instruction merely cautions the jury not to base its decision "on factors not presented at the trial."[99] However, a jury instruction that can be interpreted as requiring jury unanimity on the existence of each mitigating factor before that factor may be weighed against aggravating factors is invalid as in effect allowing one juror to veto consideration of any and all mitigating factors. Instead, each juror must be allowed to give effect to what he or she believes to be established mitigating evidence.[100]

Appellate review under a harmless error standard can preserve a death sentence based in part on a jury's consideration of an aggravating factor later found to be invalid,[101] or on a trial judge's consideration of improper aggravating circumstances.[102] In each case the sentencing authority had found other aggravating circumstances justifying imposition of capital punishment, and in *Zant* evidence relating to the invalid factor was nonetheless admissible on another basis.[103] Even in states that require the jury to weigh statutory aggravating and mitigating circumstances (and even in the absence of written findings by the jury), the appellate court may preserve a death penalty through harmless error review or through a reweighing of the aggravating and mitigating evi-

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[96] Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990).

[97] Id.

[98] Boyde v. California, 494 U.S. 370 (1990).

[99] California v. Brown, 479 U.S. 538, 543 (1987).

[100] Mills v. Maryland, 486 U.S. 367 (1988); McKoy v. North Carolina, 494 U.S. 433 (1990).

[101] Zant v. Stephens, 462 U.S. 862 (1983).

[102] Barclay v. Florida, 463 U.S. 954 (1983).

[103] In Eighth Amendment cases as in other contexts involving harmless constitutional error, the court must find that error was "'harmless beyond a reasonable doubt in that it did not contribute to the [sentence] obtained.'" Sochor v. Florida, 112 S. Ct. 2114, 2123 (1992) (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).

dence.[104] By contrast, where there is a possibility that the jury's reliance on a "totally irrelevant" factor (defendant had served time pursuant to an invalid conviction subsequently vacated) may have been decisive in balancing aggravating and mitigating factors, a death sentence may not stand in spite of the presence of other aggravating factors.[105]

Focus on the character and culpability of the defendant led the Court initially to hold that introduction of evidence about the character of the victim or the amount of emotional distress caused to the victim's family or community was inappropriate because it "creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner."[106] New membership on the Court resulted in overruling of these decisions, however, and a holding that "victim impact statements" are not barred from evidence by the Eighth Amendment.[107] "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed."[108] In the view of the Court majority, admissibility of victim impact evidence was necessary in order to restore balance to capital sentencing. Exclusion of such evidence had "unfairly weighted the scales in a capital trial; while virtually no limits are placed on the rel-

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[104] Clemons v. Mississippi, 494 U.S. 738 (1990). *Cf.* Parker v. Dugger, 498 U.S. 308 (1991) (affirmance of death sentence invalid because appellate court did not reweigh non-statutory mitigating evidence).

[105] Johnson v. Mississippi, 486 U.S. 578 (1988).

[106] Booth v. Maryland, 482 U.S. 496, 503 (1987). And culpability, the Court added, "depends not on fortuitous circumstances such as the composition [or articulateness] of [the] victim's family, but on circumstances over which [the defendant] has control." Id. at 504 n.7. The decision was 5–4, with Justice Powell's opinion of the Court being joined by Justices Brennan, Marshall, Blackmun, and Stevens, and with Chief Justice Rehnquist and Justices White, O'Connor, and Scalia dissenting. *See also* South Carolina v. Gathers, 490 U.S. 805 (1989), holding that a prosecutor's extensive comments extolling the personal characteristics of a murder victim can invalidate a death sentence when the victim's character is unrelated to the circumstances of the crime.

[107] Payne v. Tennessee, 501 U.S. 808 (1991). "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief," Chief Justice Rehnquist explained for the Court. Id. at 825. Justices White, O'Connor, Scalia, Kennedy, and Souter joined in that opinion. Justices Marshall, Blackmun, and Stevens dissented.

[108] Id. at 827. Overruling of *Booth* may have been unnecessary in *Payne*, inasmuch as the principal "victim impact" evidence introduced involved trauma to a surviving victim of attempted murder who had been stabbed at the same time his mother and sister had been murdered and who had apparently witnessed those murders; this evidence could have qualified as "admissible because . . . relate[d] directly to the circumstances of the crime." *Booth*, 482 U.S. at 507 n.10. *Gathers* was directly at issue in *Payne* because of the prosecutor's references to effects on family members not present at the crime.

evant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering 'a glimpse of the life' which a defendant 'chose to extinguish,' or demonstrating the loss to the victim's family and to society which have resulted from the defendant's homicide." [109]

The Court's rulings limiting federal *habeas corpus* review of state convictions may be expected to reduce significantly the amount of federal court litigation over state imposition of capital punishment. The Court held in *Penry v. Lynaugh* [110] that its *Teague v. Lane* [111] rule of nonretroactivity applies to capital sentencing challenges. Under *Teague*, "new rules" of constitutional interpretation announced after a defendant's conviction has become final will not be applied in *habeas* cases unless one of two exceptions applies. The exceptions will rarely apply. One exception is for decisions placing certain conduct or defendants beyond the reach of the criminal law, and the other is for decisions recognizing a fundamental procedural right "without which the likelihood of an accurate conviction is seriously diminished." [112] Further restricting the availability of federal *habeas* review is the Court's definition of "new rule." Interpretations that are a logical outgrowth or application of an earlier rule are nonetheless "new rules" unless the result was "dictated" by that precedent. [113] While in *Penry* itself the Court determined that the requested rule (requiring an instruction that the jury consider mitigating evidence of the defendant's mental retardation and abused childhood) was *not* a "new rule" because it was dictated by *Eddings* and *Lockett*, in subsequent *habeas* capital sentencing cases the Court has found substantive review barred by the "new rule" limitation. [114] A second restriction on federal *habeas*

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[109] Id. at 822 (citation omitted).

[110] 492 U.S. 302 (1989).

[111] 489 U.S. 288 (1989). The "new rule" limitation was suggested in a plurality opinion in *Teague*. A Court majority in *Penry* and later cases has adopted it.

[112] 489 U.S. at 313. The second exception was at issue in Sawyer v. Smith, 497 U.S. 227 (1990); there the Court held the exception inapplicable to the *Caldwell v. Mississippi* rule that the Eighth Amendment is violated by prosecutorial misstatements characterizing the jury's role in capital sentencing as merely recommendatory. It is "not enough," the *Sawyer* Court explained, "that a new rule is aimed at improving the accuracy of a trial. . . . A rule that qualifies under this exception must not only improve accuracy, but also 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." Id. at 242.

[113] *Penry*, 492 U.S. at 314. Put another way, it is not enough that a decision is "within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision." A decision announces a "new rule" if its result "was susceptible to debate among reasonable minds" or if it would not have been "an illogical or even a grudging application" of the prior decision to hold it inapplicable. Butler v. McKellar, 494 U.S. 407, 415 (1990).

[114] *See, e.g.*, Butler v. McKellar, 494 U.S. 407 (1990) (1988 ruling in *Arizona v. Roberson*, that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a *separate* investigation, announced

review also has ramifications for capital sentencing review. Claims that state convictions are unsupported by the evidence are weighed by a "rational factfinder" inquiry: "viewing the evidence in the light most favorable to the prosecution, [could] any rational trier of fact have found the essential elements of the crime beyond a reasonable doubt."[115] This same standard for reviewing alleged errors of state law, the Court determined, should be used by a federal *habeas* court to weigh a claim that a generally valid aggravating factor is unconstitutional *as applied* to the defendant.[116] A third rule was devised to prevent successive "abusive" or defaulted *habeas* petitions. Federal courts are barred from hearing such claims unless the defendant can show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him *eligible* for the death penalty under applicable state law.[117] The Court has also ruled that a death row inmate has no constitutional right to an attorney to help prepare a petition for state collateral review.[118]

In *Coker v. Georgia*,[119] the Court held that the state may not impose a death sentence upon a rapist who does not take a human

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a "new rule" not dictated by the 1981 decision in *Edwards v. Arizona* that police must refrain from all further questioning of an in-custody accused who invokes his right to counsel); Saffle v. Parks, 494 U.S. 484 (1990) (*habeas* petitioner's request that capital sentencing be reversed because of an instruction that the jury "avoid any influence of sympathy" is a request for a new rule not "compel[led]" by *Eddings* and *Lockett*, which governed *what* mitigating evidence a jury must be allowed to consider, not *how* it must consider that evidence); Sawyer v. Smith, 497 U.S. 227 (1990) (1985 ruling in *Caldwell v. Mississippi*, although a "predictable development in Eighth Amendment law," established a "new rule" that false prosecutorial comment on jurors' responsibility can violate the Eighth Amendment by creating an unreasonable risk of arbitrary imposition of the death penalty, since no case prior to *Caldwell* had invalidated a prosecutorial comment on Eighth Amendment grounds). *But see* Stringer v. Black, 112 S. Ct. 1130 (1992) (neither Maynard v. Cartwright, 486 U.S. 356 (1988), nor Clemons v. Mississippi, 494 U.S. 738 (1990), announced a "new rule").

[115] Lewis v. Jeffers, 497 U.S. 764, 781 (1990) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

[116] Lewis v. Jeffers, 497 U.S. 764, 780–84 (1990). The lower court erred, therefore, in conducting a comparative review to determine whether application in the defendant's case was consistent with other applications.

[117] Sawyer v. Whitley, 112 S. Ct. 2514 (1992). The focus on eligibility limits inquiry to elements of the crime and to aggravating factors, and thereby prevents presentation of mitigating evidence. Here the court was barred from considering an allegation of ineffective assistance of counsel for failure to introduce the defendant's mental health records as a mitigating factor at sentencing.

[118] Murray v. Giarratano, 492 U.S. 1 (1989) ("unit attorneys" assigned to prisons were available for some advice prior to filing a claim).

[119] 433 U.S. 584 (1977). Justice White's opinion was joined only by Justices Stewart, Blackmun, and Stevens. Justices Brennan and Marshall concurred on their view that the death penalty is per se invalid, id. at 600, and Justice Powell concurred on a more limited basis than Justice White's opinion. Id. at 601. Chief Justice Burger and Justice Rehnquist dissented. Id. at 604.

life.[120] The Court announced that the standard under the Eighth Amendment was that punishments are barred when they are "excessive" in relation to the crime committed. A "punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[121] In order that judgment not be or appear to be the subjective conclusion of individual Justices, attention must be given to objective factors, predominantly "to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions. . . ."[122] While the Court thought that the death penalty for rape passed the first test, it felt it failed the second. Georgia was the sole State providing for death for the rape of an adult woman, and juries in at least nine out of ten cases refused to impose death for rape. Aside from this view of public perception, the Court independently concluded that death is an excessive penalty for an offender who rapes but does not kill; rape cannot compare with murder "in terms of moral depravity and of injury to the person and the public."[123]

Applying the *Coker* analysis, the Court ruled in *Enmund v. Florida*[124] that death is an unconstitutional penalty for felony murder if the defendant did not himself kill, or attempt to take life, or intend that anyone be killed. While a few more States imposed capital punishment in felony murder cases than had imposed it for rape, nonetheless the weight was heavily against the practice, and the evidence of jury decisions and other indicia of a modern consensus similarly opposed the death penalty in such circumstances. Moreover, the Court determined that death was a disproportionate sentence for one who neither took life nor intended to do so. Because the death penalty is a likely deterrent only when murder is the result of premeditation and deliberation, and because the jus-

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[120] Although the Court stated the issue in the context of the rape of an adult woman, id. at 592, the opinion at no point sought to distinguish between adults and children. Justice Powell's concurrence expressed the view that death is ordinarily disproportionate for the rape of an adult woman, but that some rapes might be so brutal or heinous as to justify it. Id. at 601.

[121] Id. at 592.

[122] Id.

[123] Id. at 598.

[124] 458 U.S. 782 (1982). Justice White wrote the opinion of the Court and was joined by Justices Brennan, Marshall, Blackmun, and Stevens. Justice O'Connor, with Justices Powell and Rehnquist and Chief Justice Burger, dissented. Id. at 801. *Accord*, Cabana v. Bullock, 474 U.S. 376 (1986) (also holding that the proper remedy in a habeas case is to remand for state court determination as to whether *Enmund* findings have been made).

tification of retribution depends upon the degree of the defendant's culpability, the imposition of death upon one who participates in a crime in which a victim is murdered by one of his confederates and not as a result of his own intention serves neither of the purposes underlying the penalty.[125] In *Tison v. Arizona*, however, the Court eased the "intent to kill" requirement, holding that, in keeping with an "apparent consensus" among the states, "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement."[126] A few years earlier, *Enmund* had also been weakened by the Court's holding that the factual finding of requisite intent to kill need not be made by the guilt/innocence factfinder, whether judge or jury, but may be made by a state appellate court.[127]

A measure of protection against jury bias was added by the Court's holding that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias."[128] A year later, however, the Court ruled in *McCleskey v. Kemp*[129] that a strong statistical showing of racial disparity in capital sentencing cases is insufficient to establish an Eighth Amendment violation. Statistics alone do not establish racial discrimination in any particular case, the Court concluded, but "at most show only a likelihood that a particular factor entered into some decisions."[130] Just as important to the outcome, however, was the Court's application of the two overarching principles of prior capital punishment cases:

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[125] Justice O'Connor thought the evidence of contemporary standards did not support a finding that capital punishment was not appropriate in felony murder situations. Id. at 816–23. She also objected to finding the penalty disproportionate, first because of the degree of participation of the defendant in the underlying crime, id. at 823–26, but also because the Court appeared to be constitutionalizing a standard of intent required under state law.

[126] 481 U.S. 137, 158 (1987). The decision was 5–4. Justice O'Connor's opinion for the Court viewed a "narrow" focus on intent to kill as "a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers," id. at 157, and concluded that "reckless disregard for human life" may be held to be "implicit in knowingly engaging in criminal activities known to carry a grave risk of death." Id.

[127] Cabana v. Bullock, 474 U.S. 376 (1986). Moreover, an appellate court's finding of culpability is entitled to a presumption of correctness in federal habeas review, a habeas petitioner bearing a "heavy burden of overcoming the presumption." Id. at 387–88. *See also* Pulley v. Harris, 465 U.S. 37 (1984) (Eighth Amendment does not invariably require comparative proportionality review by a state appellate court).

[128] Turner v. Murray, 476 U.S. 28, 36–37 (1986).

[129] 481 U.S. 279 (1987). The decision was 5–4. Justice Powell's opinion of the Court was joined by Chief Justice Rehnquist and by Justices White, O'Connor, and Scalia. Justices Brennan, Blackmun, Stevens, and Marshall dissented.

[130] 481 U.S. at 308.

that a state's system must narrow a sentencer's discretion to impose the death penalty (e.g., by carefully defining "aggravating" circumstances), but must *not* constrain a sentencer's discretion to consider mitigating factors relating to the character of the defendant. While the dissenters saw the need to narrow discretion in order to reduce the chance that racial discrimination underlies jury decisions to impose the death penalty,[131] the majority emphasized the need to preserve jury discretion not to impose capital punishment. Reliance on statistics to establish a *prima facie* case of discrimination, the Court feared, could undermine the requirement that capital sentencing jurors "focus their collective judgment on the unique characteristics of a particular criminal defendant"—a focus that can result in "final and unreviewable" leniency.[132]

The Court has recently grappled with several cases involving application of the death penalty to persons of diminished capacity. The first such case involved a defendant whose competency at the time of his offense, at trial, and at sentencing had not been questioned, but who subsequently developed a mental disorder. The Court held in *Ford v. Wainwright*[133] that the Eighth Amendment prohibits the state from carrying out the death penalty on an individual who is insane, and that properly raised issues of execution-time sanity must be determined in a proceeding satisfying the minimum requirements of due process.[134] The Court noted that execution of the insane had been considered cruel and unusual at common law and at the time of adoption of the Bill of Rights, and continues to be so viewed today. And, while no states purport to permit the execution of the insane, a number, including Florida, leave the determination to the governor. Florida's procedures, the Court held, fell short of due process because the decision was vested in the governor, and because the defendant was given no opportunity to be heard, the governor's decision being based on reports of three state-appointed psychiatrists.[135]

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[131] Id. at 339–40 (Brennan), 345 (Blackmun), 366 (Stevens).

[132] Id. at 311. Concern for protecting "the fundamental role of discretion in our criminal justice system" also underlay the Court's rejection of an equal protection challenge in *McCleskey*. *See* p. 1857, infra.

[133] 477 U.S. 399 (1986).

[134] There was an opinion of the Court only on the first issue, that the Eighth Amendment creates a right not to be executed while insane. Justice Marshall's opinion to that effect was joined by Justices Brennan, Blackmun, Stevens, and Powell. The Court's opinion did not attempt to define insanity; Justice Powell's concurring opinion would have held the prohibition applicable only for "those who are unaware of the punishment they are about to suffer and why they are to suffer it." Id. at 422.

[135] There was no opinion of the Court on the issue of procedural requirements. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, would hold that "the ascertainment of a prisoner's sanity . . . calls for no less stringent stand-

By contrast the Court in 1989 found "insufficient evidence of a national consensus against executing mentally retarded people." While the Court conceded that "it may indeed be 'cruel and unusual' punishment to execute persons who are profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions," retarded persons who have been found competent to stand trial, and who have failed to establish an insanity defense, fall into a different category. Consequently, the Court was unwilling to conclude that execution of a mentally retarded person is "categorically prohibited by the Eighth Amendment."[136] What is required in this as in other contexts, however, is individualized consideration of culpability: a retarded defendant must be offered the benefit of an instruction that the jury may consider and give mitigating effect to evidence of retardation or abused background.[137]

There is also no categorical prohibition on execution of juveniles. A closely divided Court has invalidated one statutory scheme which permitted capital punishment to be imposed for crimes committed before age 16, but has upheld other statutes authorizing capital punishment for crimes committed by 16 and 17 year olds. Important to resolution of the first case was the fact that Oklahoma set no minimum age for capital punishment, but by separate provision allowed juveniles to be treated as adults for some purposes.[138] While four Justices favored a flat ruling that execution of anyone younger than 16 at the time of his offense is barred by the Eighth Amendment, concurring Justice O'Connor found Oklahoma's scheme defective as not having necessarily resulted from the special care and deliberation that must attend decisions to impose the death penalty.[139] The following year Justice O'Connor again provided the decisive vote when the Court in *Stanford v.*

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ards than those demanded in any other aspect of a capital proceeding." 477 U.S. at 411–12. Concurring Justice Powell thought that due process might be met by a proceeding "far less formal than a trial," that the state "should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel." Id. at 427. Concurring Justice O'Connor, joined by Justice White, emphasized Florida's denial of the opportunity to be heard, and did not express an opinion on whether the state could designate the governor as decisionmaker. Thus Justice Powell's opinion, requiring the opportunity to be heard before an impartial officer or board, sets forth the Court's holding.

[136] Penry v. Lynaugh, 492 U.S. 302, 335 (1989).

[137] Id. at 328.

[138] Thompson v. Oklahoma, 487 U.S. 815 (1988).

[139] The plurality opinion by Justice Stevens was joined by Justices Brennan, Marshall, and Blackmun; as indicated in the text, Justice O'Connor concurred in a separate opinion; and Justice Scalia, joined by Chief Justice Rehnquist and by Justice White, dissented. Justice Kennedy did not participate.

Kentucky[140] held that the Eighth Amendment does not categorically prohibit imposition of the death penalty for individuals who commit crimes at age 16 or 17. Like Oklahoma, neither Kentucky nor Missouri[141] directly specified a minimum age for the death penalty. To Justice O'Connor, however, the critical difference was that there clearly was no national consensus forbidding imposition of capital punishment on 16 or 17-year-old murderers, whereas there was such a consensus against execution of 15 year olds.[142]

The *Stanford* Court was split over the appropriate scope of inquiry in cruel and unusual punishment cases. Justice Scalia's plurality would focus almost exclusively on an assessment of what the state legislatures and Congress have done in setting an age limit for application of capital punishment.[143] The *Stanford* dissenters would broaden this inquiry with proportionality review that considers the defendant's culpability as one aspect of the gravity of the offense, that considers age as one indicator of culpability, and that looks to other statutory age classifications to arrive at a conclusion about the level of maturity and responsibility that society expects of juveniles.[144] Justice O'Connor, while recognizing the Court's "constitutional obligation to conduct proportionality analysis," does not believe that such analysis can resolve the underlying issue of the constitutionally required minimum age.[145]

While the Court continues to tinker with the law of capital punishment, it has taken a number of steps in the 1980s and early 1990s to attempt to reduce the many procedural and substantive opportunities for delay and defeat of the carrying out of death sentences, and to give the states more leeway in administering capital sentencing. The early post-*Furman* stage involving creation of procedural protections for capital defendants, and premised on a

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[140] 492 U.S. 361 (1989). The bulk of Justice Scalia's opinion, representing the opinion of the Court, was joined by Chief Justice Rehnquist and by Justices White, O'Connor, and Kennedy. Justice O'Connor took exceptions to other portions of Justice Scalia's opinion (dealing with proportionality analysis); and Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented.

[141] The case of *Wilkins v. Missouri* was decided along with *Stanford*.

[142] *Compare* Thompson, 487 U.S. at 849 (O'Connor, J., concurring) (two-thirds of all state legislatures had concluded that no one should be executed for a crime committed at age 15, and no state had "unequivocally endorsed" a lower age limit) *with* Stanford, 492 U.S. at 370 (15 of 37 states permitting capital punishment decline to impose it on 16-year-old offenders; 12 decline to impose it on 17-year-old-offenders).

[143] "A revised national consensus so broad, so clear and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved." 492 U.S. at 377.

[144] Id. at 394–96.

[145] Id. at 382.

"death is different" rationale,[146] gave way to increasing impatience with the delays made possible through procedural protections, especially those associated with federal habeas corpus review.[147] Having consistently held that capital punishment is not inherently unconstitutional, the Court seems bent on clarifying and even streamlining constitutionally required procedures so that those states that choose to impose capital punishment may do so without inordinate delays. Changed membership on the Court is having its effect; gone from the Court are Justices Brennan and Marshall, whose belief that all capital punishment constitutes cruel and unusual punishment meant two automatic votes against any challenged death sentence. Strong differences remain over such issues as the appropriate framework for consideration of aggravating and mitigating circumstances and the appropriate scope of federal review, but as of 1992 a Court majority seems committed to reducing obstacles created by federal review of death sentences pursuant to state laws that have been upheld as constitutional.

Proportionality.—Justice Field in *O'Neil v. Vermont*[148] argued in dissent that in addition to prohibiting punishments deemed barbarous and inhumane the Eighth Amendment also condemned "all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged." In *Weems v. United States*,[149] this view was adopted by the Court in striking down a sentence in the Philippine Islands of 15 years incarceration at hard labor with chains on the ankles, loss of all civil rights, and perpetual surveillance, for the offense of falsifying public documents. The Court compared the sentence with those meted out for other offenses and concluded: "This contrast shows more than dif-

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[146] *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 357–58 (1977): "From the point of view of the defendant, [death] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

[147] *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880, 888 (1983): "unlike a term of years, a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding. Accordingly, federal courts must isolate the exceptional cases where constitutional error requires retrial or resentencing as certainly and swiftly as orderly procedures will permit." *See also* Gomez v. United States District Court, 112 S. Ct. 1652 (1992) (vacating orders staying an execution, and refusing to consider, because of "abusive delay," a claim that "could have been brought more than a decade ago"—that California's method of execution (cyanide gas) constitutes cruel and unusual punishment).

[148] 144 U.S. 323, 339–40 (1892). *See also* Howard v. Fleming, 191 U.S. 126, 135–36 (1903).

[149] 217 U.S. 349 (1910). The Court was here applying not the Eighth Amendment but a statutory bill of rights applying to the Philippines which it interpreted as having the same meaning. Id. at 367.

ferent exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice." [150] Punishments as well as fines, therefore, can be condemned as excessive. [151]

In *Robinson v. California* [152] the Court carried the principle to new heights, setting aside a conviction under a law making it a crime to "be addicted to the use of narcotics." The statute was unconstitutional because it punished the "mere status" of being an addict without any requirement of a showing that a defendant had ever used narcotics within the jurisdiction of the State or had committed any act at all within the State's power to proscribe, and because addiction is an illness which—however it is acquired—physiologically compels the victim to continue using drugs. The case could stand for the principle, therefore, that one may not be punished for a status in the absence of some act, [153] or it could stand for the broader principle that it is cruel and unusual to punish someone for conduct he is unable to control, a holding of far-reaching importance. [154] In *Powell v. Texas*, [155] a majority of the Justices

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[150] Id. at 381.

[151] Proportionality in the context of capital punishment is considered supra, pp. 1478–79.

[152] 370 U.S. 660 (1962).

[153] A different approach to essentially the same problem was Thompson v. Louisville, 362 U.S. 199 (1960), in which a conviction for loitering and disorderly conduct was set aside as being supported by "no evidence whatever" that defendant had done anything. *Cf.* Johnson v. Florida, 391 U.S. 596 (1968) (no evidence that the defendant was "wandering or strolling around" in violation of vagrancy law).

[154] Fully applied, the principle would raise to constitutional status the concept of *mens rea*, and it would thereby constitutionalize some form of insanity defense as well as other capacity defenses. For a somewhat different approach, *see* Lambert v. California, 355 U.S. 225 (1957) (due process denial for city to apply felon registration requirement to someone present in city but lacking knowledge of requirement). More recently, this controversy has become a due process matter, with the holding that the due process clause requires the prosecution to prove beyond a reasonable doubt the facts necessary to constitute the crime charged, Mullaney v. Wilbur, 421 U.S. 684 (1975), raising the issue of the insanity defense and other such questions. *See* Rivera v. Delaware, 429 U.S. 877 (1976), Patterson v. New York, 432 U.S. 197, 202–05 (1977). In Solem v. Helm, 463 U.S. 277, 297 n.22 (1983), an Eighth Amendment proportionality case, the Court suggested in dictum that life imprisonment without possibility of parole of a recidivist who was an alcoholic, and all of whose crimes had been influenced by his alcohol use, was "unlikely to advance the goals of our criminal justice system in any substantial way."

[155] 392 U.S. 514 (1968). The plurality opinion by Justice Marshall, joined by Justices Black and Harlan and Chief Justice Warren, interpreted *Robinson* as proscribing only punishment of "status," and not punishment for "acts," and expressed a fear that a contrary holding would impel the Court into constitutional definitions of such matters as *actus reus, mens rea*, insanity, mistake, justification, and duress. Id. at 532–37. Justice White concurred, but only because the record did not show that the defendant was unable to stay out of public; like the dissent, Justice White

took the latter view of *Robinson*, but the result, because of a view of the facts held by one Justice, was a refusal to invalidate a conviction of an alcoholic for public drunkenness. Whether the Eighth Amendment or the due process clauses will govern the requirement of the recognition of capacity defenses to criminal charges, or whether either will, remains to be decided in future cases.

The Court has gone back and forth in its acceptance of proportionality analysis in noncapital cases. It appeared that such analysis had been closely cabined in *Rummel v. Estelle*,[156] upholding a mandatory life sentence under a recidivist statute following a third felony conviction, even though the defendant's three nonviolent felonies had netted him a total of less than $230. The Court reasoned that the unique quality of the death penalty rendered capital cases of limited value, and *Weems* was distinguished on the basis that the length of the sentence was of considerably less concern to the Court than were the brutal prison conditions and the postrelease denial of significant rights imposed under the peculiar Philippine penal code. Thus, in order to avoid improper judicial interference into state penal systems, Eighth Amendment judgments must be informed by objective factors to the maximum extent possible. But when the challenge to punishment goes to the length rather than the seriousness of the offense, the choice is necessarily subjective. Therefore, the *Rummel* rule appeared to be that States may punish any behavior properly classified as a felony with any length of imprisonment purely as a matter of legislative grace.[157] The Court dismissed as unavailing the factors relied on by the defendant. First, the fact that the nature of the offense was nonviolent was found not necessarily relevant to the seriousness of a crime, and the determination of what is a "small" amount of money, being so subjective, was a legislative task. In any event, the State could focus on recidivism, not the specific acts. Second, the comparison of punishment imposed for the same offenses in other jurisdictions was found unhelpful, differences and similarities being

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was willing to hold that if addiction as a status may not be punished neither can the yielding to the compulsion of that addiction, whether to narcotics or to alcohol. Id. at 548. Dissenting Justices Fortas, Douglas, Brennan, and Stewart wished to adopt a rule that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." That is, one under an irresistible compulsion to drink or to take narcotics may not be punished for those acts. Id. at 554, 567.

[156] 445 U.S. 263 (1980). The opinion, by Justice Rehnquist, was concurred in by Chief Justice Burger and Justices Stewart, White, and Blackmun. Dissenting were Justices Powell, Brennan, Marshall, and Stevens. Id. at 285.

[157] In Hutto v. Davis, 454 U.S. 370 (1982), on the authority of *Rummel*, the Court summarily reversed a decision holding disproportionate a prison term of 40 years and a fine of $20,000 for defendant's possession and distribution of approximately nine ounces of marijuana said to have a street value of about $200.

more subtle than gross, and in any case in a federal system one jurisdiction would always be more severe than the rest. Third, the comparison of punishment imposed for other offenses in the same State ignored the recidivism aspect.[158]

Rummel was distinguished in *Solem v. Helm*,[159] the Court stating unequivocally that the cruel and unusual punishments clause "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed," and that "[t]here is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences."[160] Helm, like Rummel, had been sentenced under a recidivist statute following conviction for a nonviolent felony involving a small amount of money.[161] The difference was that Helm's sentence of life imprisonment without possibility of parole was viewed as "far more severe than the life sentence we described in *Rummel*."[162] Rummel, the Court pointed out, had been eligible for parole after 12 years' imprisonment, while Helm had only the possibility of executive clemency, characterized by the Court as "nothing more than a hope for 'an *ad hoc* exercise of clemency.'"[163] In *Helm* the Court also spelled out the "objective criteria" by which proportionality issues should be judged: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[164] Measured by these criteria Helm's sentence was cruel and unusual. His crime was relatively minor, yet life imprisonment without possibility for parole was the harshest penalty possible in South Dakota, reserved for such other offenses as murder, manslaughter, kidnapping, and arson. In only one other state could he have received so harsh a sentence, and in no other state was it mandated.[165]

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[158] *Rummel*, 445 U.S. at 275–82. The dissent deemed these three factors to be sufficiently objective to apply and thought they demonstrated the invalidity of the sentence imposed. Id. at 285, 295–303.

[159] 463 U.S. 277 (1983). The case, as *Rummel*, was decided by 5–4 vote, with the *Rummel* dissenters, joined by Justice Blackmun from the *Rummel* majority, composing the majority, and with Justice O'Connor taking Justice Stewart's place in opposition to holding the sentence invalid. Justice Powell wrote the opinion of the Court in *Helm*, and Chief Justice Burger wrote the dissent.

[160] 463 U.S. at 284, 288.

[161] The final conviction was for uttering a no-account check in the amount of $100; previous felony convictions were also for nonviolent crimes described by the Court as "relatively minor." 463 U.S. at 296–97.

[162] Id. at 297.

[163] Id. at 303.

[164] Id. at 292.

[165] For a suggestion that Eighth Amendment proportionality analysis may limit the severity of punishment possible for prohibited private and consensual homo-

The Court remained closely divided in holding in *Harmelin v. Michigan*[166] that a mandatory term of life imprisonment without possibility of parole was not cruel and unusual as applied to the crime of possession of more than 650 grams of cocaine. There was an opinion of the Court only on the issue of the mandatory nature of the penalty, the Court rejecting an argument that sentencers in non-capital cases must be allowed to hear mitigating evidence.[167] As to the length of sentence, three majority Justices—Kennedy, O'Connor, and Souter—would recognize a narrow proportionality principle, but considered Harmelin's crime severe and by no means grossly disproportionate to the penalty imposed.[168]

Prisons and Punishment.—"It is unquestioned that '[c]onfinement' in a prison . . . is a form of punishment subject to scrutiny under the Eighth Amendment standards."[169] "Conditions in prison must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment. . . . Conditions . . . , alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities. . . . But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders

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sexual conduct, see Justice Powell's concurring opinion in Bowers v. Hardwick, 478 U.S. 186, 197 (1986).

[166] 501 U.S. 957 (1991).

[167] "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense." Id. at 994. The Court's opinion, written by Justice Scalia, then elaborated an understanding of "unusual"—set forth elsewhere in a part of his opinion subscribed to only by Chief Justice Rehnquist—that denies the possibility of proportionality review altogether. Mandatory penalties are not unusual in the constitutional sense because they have "been employed in various form throughout our Nation's history." This is an application of Justice Scalia's belief that cruelty and unusualness are to be determined solely by reference to the punishment at issue, and without reference to the crime for which it is imposed. See id. at 975–78 (not opinion of Court—only Chief Justice Rehnquist joined this portion of the opinion). Because a majority of other Justices indicated in the same case that they do recognize at least a narrow proportionality principle (see id. at 996 (Justices Kennedy, O'Connor, and Souter concurring); id. at 1009 (Justices White, Blackmun, and Stevens dissenting); id. at 1027 (Justice Marshall dissenting)), the fact that three of those Justices (Kennedy, O'Connor, and Souter) joined Justice Scalia's opinion on mandatory penalties should probably not be read as representing agreement with Justice Scalia's general approach to proportionality.

[168] Because of the "serious nature" of the crime, the 3-Justice plurality asserted that there was no need to apply the other *Solem* factors comparing the sentence to sentences imposed for other crimes in Michigan, and to sentences imposed for the same crime in other jurisdictions. Id. at 1004. Dissenting Justice White, joined by Justices Blackmun and Stevens (Justice Marshall also expressed agreement on this and most other points, id. at 1027), asserted that Justice Kennedy's approach would "eviscerate" *Solem*. Id. at 1018.

[169] Rhodes v. Chapman, 452 U.S. 337, 345 (1981) (quoting Hutto v. Finney, 437 U.S. 678, 685 (1978)).

pay for their offenses against society."[170] These general principles apply both to the treatment of individuals[171] and to the creation or maintenance of prison conditions that are inhumane to inmates generally.[172] Ordinarily there is both a subjective and an objective inquiry. Before conditions of confinement not formally meted out as punishment by the statute or sentencing judge can qualify as "punishment," there must be a culpable, "wanton" state of mind on the part of prison officials.[173] In the context of general prison conditions, this culpable state of mind is "deliberate indifference";[174] in the context of emergency actions, e.g., actions required to suppress a disturbance by inmates, only a malicious and sadistic state of mind is culpable.[175] When excessive force is alleged, the objective standard varies depending upon whether that force was applied in a good-faith effort to maintain or restore discipline, or whether it was applied maliciously and sadistically to cause harm. In the good-faith context, there must be proof of significant injury. When, however, prison officials "maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated," and there is no need to prove that "significant injury" resulted.[176]

Beginning with *Holt v. Sarver*,[177] federal courts found prisons or entire prison systems violative of the cruel and unusual punishments clause, and broad remedial orders directed to improving prison conditions and ameliorating prison life were imposed in more than two dozen States.[178] But while the Supreme Court expressed general agreement with the thrust of the lower court actions, it set aside two rather extensive decrees and cautioned the federal courts to proceed with deference to the decisions of state

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[170] 452 U.S. at 347.

[171] E.g., Estelle v. Gamble, 429 U.S. 97 (1976) (deliberate medical neglect of a prisoner violates Eighth Amendment); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (beating prisoner with leather strap violates Amendment).

[172] E.g., Hutto v. Finney, 437 U.S. 678 (1978).

[173] Wilson v. Seiter, 501 U.S. 294 (1991).

[174] Id. at 303.

[175] Whitley v. Albers, 475 U.S. 312 (1986) (arguably excessive force in suppressing prison uprising did not constitute cruel and unusual punishment).

[176] Hudson v. McMillian, 112 S. Ct. 995, 1000 (1992) (beating of a shackled prisoner resulted in bruises, swelling, loosened teeth, and a cracked dental plate).

[177] 309 F. Supp. 362 (E.D. Ark. 1970), aff'd, 442 F.2d 304 (8th Cir. 1971), district court ordered to retain jurisdiction until unconstitutional conditions corrected, 505 F.2d 194 (8th Cir. 1974). The Supreme Court ultimately sustained the decisions of the lower courts in Hutto v. Finney, 437 U.S. 678 (1978).

[178] Rhodes v. Chapman, 452 U.S. 337, 353–54 n.1 (1981) (Justice Brennan concurring) (collecting cases). *See* Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981). Congress encouraged the bringing of much litigation by enacting the Civil Rights of Institutionalized Persons Act, Pub. L. No. 96–247, 94 Stat. 349, 42 U.S.C. §§ 1997 et seq.

legislatures and prison administrators.[179] In both cases, the prisons involved were of fairly recent vintage and the conditions, while harsh, did not approach the conditions described in many of the lower court decisions that had been left undisturbed.[180] Thus, concerns of federalism and of judicial restraint apparently actuated the Court to begin to curb the lower federal courts from ordering remedial action for systems in which the prevailing circumstances, given the resources States choose to devote to them, "cannot be said to be cruel and unusual under contemporary standards."[181]

Limitation of the Clause to Criminal Punishments.—The Eighth Amendment deals only with criminal punishment, and has no application to civil processes. In holding the Amendment inapplicable to the infliction of corporal punishment upon schoolchildren for disciplinary purposes, the Court explained that the cruel and unusual punishments clause "circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such."[182] These limitations, the Court thought, should not be extended outside the criminal process.

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[179] Bell v. Wolfish, 441 U.S. 520 (1979); Rhodes v. Chapman, 452 U.S. 337 (1981).

[180] *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) (describing conditions of "horrendous overcrowding," inadequate sanitation, infested food, and "rampant violence"); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1981) (describing conditions "unfit for human habitation"). The primary issue in both *Wolfish* and *Chapman* was that of "double-celling," the confinement of two or more prisoners in a cell designed for one. In both cases, the Court found the record did not support orders ending the practice.

[181] Rhodes v. Chapman, 452 U.S. 337, 347 (1981). *See also* Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748 (1991) (allowing modification, based on a significant change in law or facts, of a 1979 consent decree that had ordered construction of a new jail with single-occupancy cells; modification was to depend upon whether the upsurge in jail population was anticipated when the decree was entered, and whether the decree was premised on the mistaken belief that single-celling is constitutionally mandated).

[182] Ingraham v. Wright, 430 U.S. 651, 667 (1977) (citations omitted). Constitutional restraint on school discipline, the Court ruled, is to be found in the due process clause if at all.