

The New Law of Murder

DANIEL GIVELBER*

[T]he loose term "malice" was used, and then when a particular state of mind came under their notice the Judges called it "malice" or not according to their view of the propriety of hanging particular people. That is, in two words, the history of the definition of murder.¹

There is today a new law of murder. Embedded in the menu of aggravating circumstances characteristic of contemporary capital punishment statutes, the new law performs the traditional function of murder law by separating those killers whom the state may execute from those whom it may not.² Over time, the law of murder has changed to reflect shifts in sentiment as to which killers most deserve capital punishment.³ The new law, developed over the past twenty years, represents the most dramatic reworking of these sentiments since the Pennsylvania legislature first divided the crime of murder into degrees in 1794.⁴ In order to retain capital punishment,⁵ thirty-six states have

* Professor of Law, Northeastern University School of Law. I wish to thank: my colleagues Mike Meltsner and Steve Subrin for their valuable comments on this manuscript; Dean James Fox of the Northeastern College of Criminal Justice for his analysis of the Supplemental Homicide Reports; Associate Dean Brian Lutch and former Dean Daniel Coquillette of Boston College Law School for providing the space and facilities for undertaking this sabbatical project; and, Joe McConnell, Northeastern '93, for his invaluable research assistance.

1. ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE, 1866, at Q.2110 [hereinafter 1866 MINUTES OF EVIDENCE] (statement of Sir James F. Stephen), quoted in ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT, 1953, cmt. 8932 at 28 [hereinafter ROYAL COMM'N].

2. See ROYAL COMM'N, *supra* note 1, at 381; Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide I*, 37 COLUM. L. REV. 701, 702 (1937).

3. See 1866 MINUTES OF EVIDENCE, *supra* note 1.

4. See Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759 (1949). Between 1794 and 1972, another significant development in the law of murder evolved which did not involve the delineation of which killings and killers are most depraved: the shift from mandatory to discretionary death sentencing. Introduced by Tennessee in the middle of the nineteenth century, discretionary death sentencing was the virtually universal approach as of the time of *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976). MODEL PENAL CODE § 201.6 commentary at 66, (Tentative Draft No. 9) (Am. L. Inst. 1959) [hereinafter Tent. Draft No. 9]; see John W. Poulos, *The Supreme Court, Capital Punishment, and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 148-54 (1986) [hereinafter Poulos, *The Supreme Court*].

5. In 1972, the Supreme Court held that the Georgia murder law then authorizing the imposition of capital punishment violated the Eighth Amendment to the United States Constitution. *Furman v. Georgia*, 408 U.S. 238 (1972). Four years later it held that a revised Georgia law calling for somewhat controlled discretion satisfied the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. 153. The Court also upheld the Texas and Florida revisions on similar grounds, *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976), while rejecting the mandatory approach of Louisiana and North Carolina, *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

created the new crime of aggravated murder; these new rules apply to 78% of the population *and* to 79% of the homicides that occur in this country.⁶

The new laws purport to solve the problem of the arbitrary and capricious application of the death penalty which the Supreme Court believed plagued the pre-1972 practice. The laws undertake a task authoritatively viewed in 1971 as "beyond present human ability."⁷ While the details of the new approach vary from state to state, all of the new laws employ at least two innovations: (a) through the mechanism of aggravated murder or aggravating circumstances, they limit eligibility for capital punishment to a subset of those covered by the traditional law; and (b) they require the discretionary decision as to life or death to be made at a trial separate from that which determined guilt or innocence.⁸ This approach incorporates the two major reforms of the last 200 years—dividing murder into degrees and making the decision to

6. For the year 1991, 19,555 out of 24,703, or 79.1% of all murders and non-negligent manslaughters occurred in the 37 states embracing capital punishment as of the end of 1992. These states had a combined population of about 197,104,000 out of a total United States population of about 252,251,000. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, SOURCEBOOK OF CRIMINAL STATISTICS 1992, tbl. 3.124 [hereinafter BUREAU OF JUSTICE STATISTICS]. The states that authorize capital punishment are: Alabama, ALA. CODE §§ 13A-5-40 to -59 (1982 & Supp. 1993); Arizona, ARIZ. REV. STAT. ANN. § 13-703 (1989); Arkansas, ARK. CODE ANN. §§ 5-4-601 to -605 (Michie 1987 & Supp. 1991); California, CAL. PENAL CODE §§ 190.1-.5 (West 1988 & Supp. 1993); Colorado, COLO. REV. STAT. ANN. § 16-11-103 (West 1993); Connecticut, CONN. GEN. STAT. §§ 53a-46a to -46c (West 1985 & Supp. 1993); Delaware, DEL. CODE ANN. tit. 11, § 4209 (1987 & Supp. 1992); Florida, FLA. STAT. ANN. §§ 921.141-.142 (West 1985 & Supp. 1993); Georgia, GA. CODE ANN. §§ 17-10-30 to -44 (Michie 1990 & Supp. 1993); Idaho, IDAHO CODE § 19-2515 (1987); Illinois, ILL. ANN. STAT. ch. 720, para. 9-1 (Smith-Hurd Supp. 1993); Indiana, IND. CODE § 35-50-2-9 (Supp. 1992); Kentucky, KY. REV. STAT. ANN. §§ 532.025-.030 (Michie/Bobbs-Merrill 1990); Louisiana, LA. CODE CRIM. PROC. ANN. arts. 905.3-.9 (West 1984 & Supp. 1993); Maryland, MD. ANN. CODE art. 27, §§ 412-414 (1992 & Supp. 1993); Mississippi, MISS. CODE ANN. §§ 99-19-101 to -107 (Supp. 1993); Missouri, MO. ANN. STAT. §§ 565.030-.035 (Vernon Supp. 1993); Montana, MONT. CODE ANN. §§ 46-18-301 to -310 (1993); Nebraska, NEB. REV. STAT. §§ 29-2522 to -2523 (1989); Nevada, NEV. REV. STAT. ANN. §§ 200.030-.035 (Michie 1992); New Hampshire, N.H. REV. STAT. ANN. § 630:5 (Supp. 1992); New Jersey, N.J. STAT. ANN. § 2C:11-3 (West Supp. 1993); New Mexico, N.M. STAT. ANN. §§ 31-20A-1 to -6 (Michie 1990 & Supp. 1993); North Carolina, N.C. GEN. STAT. §§ 15A-2000 to -2002 (1990 & Supp. 1993); Ohio, OHIO REV. CODE ANN. §§ 2929.02-.06 (Anderson 1993); Oklahoma, OKLA. STAT. ANN. tit. 21, §§ 701.9-.13 (West 1983 & Supp. 1993); Oregon, OR. REV. STAT. § 163.150 (Supp. 1992); Pennsylvania, 42 PA. CONS. STAT. ANN. § 9711 (1982 & Supp. 1993); South Carolina, S.C. CODE ANN. §§ 16-3-20 to -28 (Law. Co-op. 1976 & Supp. 1992); South Dakota, S.D. CODIFIED LAWS ANN. § 23A-27A-1 to -41 (1988 & Supp. 1993); Tennessee, TENN. CODE ANN. §§ 39-13-202 to -206 (1991 & Supp. 1992); Texas, TEX. CODE CRIM. PROC. ANN. art. 37.071 (West Supp. 1993); Utah, UTAH CODE ANN. §§ 76-3-206 to -207 (1990); Vermont, VT. STAT. ANN. tit. 13, §§ 7101-7107, (1974); Virginia, VA. CODE ANN. §§ 19.2-264.2 to -264.5 (Michie 1990 & Supp. 1993); Washington, WASH. REV. CODE ANN. §§ 10.95.020-.150 (West 1990); and Wyoming, WYO. STAT. ANN. §§ 6-2-102 to -103 (Michie Supp. 1993). Of these, all but Vermont employ the concept of aggravated murder.

7. McGautha v. California, 402 U.S. 183, 204 (1971) ("To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.").

8. Chief Justice Rehnquist, writing for the majority in *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988), summarized the Eighth Amendment requirements as follows: "There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more."

impose death discretionary.⁹ However, it recasts the criteria for the most serious degree of murder and alters the circumstances under which the discretionary decision is made. This Article focuses on the first of these changes, the articulation of a new, substantive law of murder.¹⁰

The new law of aggravated murder can be broadly summarized as follows: One who intentionally, knowingly, or with gross recklessness kills another is guilty of capital murder (and thus may be executed) if (a) the defendant has been convicted of murder previously; (b) the defendant killed to secure financial gain; (c) the defendant killed in the course of the commission of a felony; (d) the defendant either killed in a protracted manner or tortured the victim; or (e) the defendant killed a police officer or correctional official.¹¹

This approach rejects five centuries of emphasis on the defendant's state of mind as a key determinant of death eligibility.¹² However flawed the premeditation and deliberation formula might have been in application, it reflected the premise that culpability was related to choice in the sense that an unprovoked, conscious, and deliberate decision to take the life of another was the paradigm of the capital murderer. The new capital murder rules make no such claim. In the ostensible service of reducing arbitrariness (if not achieving rationality)¹³ when imposing the death penalty, the search has turned from the killer's state of mind to "objective," external aggravating facts.

9. The commentary to the Model Penal Code asserted, "[g]rading and discretion, then, have been the means pervasively employed in the United States to limit the use of capital punishment for homicides that would be murder at common law." Tent. Draft No. 9, *supra* note 4, at 66. These are still the means used to limit the use of capital punishment. What has changed are the criteria for grading, and the mechanisms for exercising discretion.

10. Although there have been 20 years of judicial and legislative efforts to craft a new set of rules for murder, relatively little attention has focused on just what those rules are and how they relate to the more general goals of the substantive criminal law. There are notable exceptions. *See, e.g.,* Bruce S. Ledewitz, *The New Role of Statutory Aggravating Circumstances in American Death Penalty Law*, 22 DUQ. L. REV. 317, 369-96 (1984); John W. Poulos, *Liability Rules, Sentencing Factors, and the Sixth Amendment Right to a Jury Trial: A Preliminary Inquiry*, 44 U. MIAMI L. REV. 643, 646-47 (1990) [hereinafter Poulos, *Liability Rules*]; Poulos, *The Supreme Court*, *supra* note 4; Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103 (1990) [hereinafter Rosen, *Felony Murder*]; Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941 (1986) [hereinafter Rosen, *The Standardless Standard*]; *see also*, Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 LAW & SOC'Y REV. 367 (1991) (combining substantive and empirical analysis of capital punishment as it relates to gender).

11. This is the Model Penal Code definition of murder. MODEL PENAL CODE § 210.2 (Am. Law Inst. 1980). In a number of states, an accidental killing will suffice, as long as it occurs during the commission of a felony. Under *Tison v. Arizona*, 481 U.S. 137 (1987), the Supreme Court appears to require at least "reckless indifference" or "reckless disregard," both of which, are consistent with an accident. *Id.* at 157-58.

12. ROYAL COMM'N, *supra* note 1, at 25-28.

13. The relevant sections of the Model Penal Code were presented in draft form in 1959 and adopted by the American Law Institute in 1962. MODEL PENAL CODE art. 210. They were designed to eliminate problems—including arbitrariness and inequality—that flowed from the traditional approach of dividing murder into degrees and giving the jury unfettered discretion. *See id.* art. 210 commentary at 1-3. The Model Penal Code does not mention constitutional concerns, nor could it have. The Institute would have needed unparalleled prescience to have anticipated, in 1959, the decisions in *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976).

To a surprising degree, death may be imposed based on the identity of the victim, the method of killing, and the prior record of the killer. Shooting and killing during a robbery at a 7-Eleven can result in the death penalty, as can a frenzied effort to end life with a knife or heavy instrument; the calculated killing of one's spouse, if done efficiently,¹⁴ cannot.¹⁵ While felony murderers remain as likely to receive death sentences under the new law as under the old, efficient domestic killers are now generally exempt. Additionally, in more than half of the states that sanction capital punishment,¹⁶ frenzied killers who might have been exempt under the old formula¹⁷ are now eligible for death.

The new law is a failure. By most measures, it has marginally reduced but by no means eliminated arbitrariness from capital punishment. It has exacerbated rather than ameliorated the role race plays in capital punishment decisions. Doctrinally, it introduces an element of strict liability into what should be the most refined judgment society makes about a person's mental processes. The new law represents a triumph for the objectivity and moral obtuseness of the felony murder principle as the model for how society should go about selecting those who die. Writ large, the new law of murder reflects an approach to criminal responsibility that lacks any self-limiting principle.

The shift from *mens rea* to aggravating factors represents a fundamental change in the purpose of the law of capital murder. Stated most broadly, society has abandoned the goal of controlling specific criminal behavior through the use of the death penalty. Its new goal seems to be to execute those whose conduct appears most frightening to the reasonable person. The focus has shifted from the state of mind of the defendant to the state of mind of the *sentencer*. Whether the new approach is characterized as utilitarian or

14. As a matter of law, an efficient killing cannot, in many states, be particularly "heinous" or "atrocious" because the victim did not suffer consciously before expiring. *See, e.g.,* *Stouffer v. State*, 742 P.2d 562, 563 (Okla. 1987), *cert. denied*, 484 U.S. 1036 (1988) (interpreting the "heinousness" provision of the Oklahoma law to require torture or serious physical abuse in the course of the murder in order to meet Eighth Amendment narrowing concerns). Most lists of aggravating circumstances provide no other basis for including a domestic killing. Interestingly, the Royal Commission on Capital Punishment criticized the forerunner of the "aggravated circumstances" model, the Home Secretary's 1948 proposed revision of the murder statute, for precisely this omission:

The distinction between capital and non-capital murders was not founded on any rational principle and would lead to many anomalies and inconsistencies. Many of the most heinous crimes, such as cruel and deliberate murder by a husband of his wife, or political assassination, would not be punishable with death, while less odious offences would still be capital.

ROYAL COMM'N, *supra* note 1, at 171.

15. Rapaport, *supra* note 10, at 369, 377-78.

16. *See Rosen, The Standardless Standard, supra* note 10, at 943 (listing 24 such states but including California, whose Supreme Court rejected the circumstance as unconstitutionally vague. *People v. Superior Court*, 647 P.2d 76, 81 (Cal. 1982)).

17. *People v. Anderson*, 447 P.2d 942 (Cal. 1968), involving the murder of a child by repeated stabbing, typifies this kind of case. The California Supreme Court rejected the first-degree murder conviction and death sentence because it found that, in the absence of proof of the defendant's motive, actions before the killing, or acts that were reasonably calculated to kill, there was insufficient evidence to support a finding of premeditation and deliberation. *Id.* While the California Supreme Court might still interpret its statute in this manner today (*People v. Boyd*, 729 P.2d 802 (Cal. 1987)), indicates that the court still struggles with *Anderson*, in most states this kind of killing is the classic murder reached by the heinousness provision.

“moral” is well beside the point; the current approach represents a dramatic and unnecessary concession that the business of criminal law is to process criminals rather than control crime. Even if it is uncertain whether gradations in punishment are effective in controlling particular forms of antisocial behavior, those who craft the law should not surrender the principle that humans are rational and will respond rationally. To do so leaves society without any limiting principle on the definition of crime or the sanctions that should accompany it.

Part I of this Article explores the contemporary roots of the new law of murder by briefly tracing the parallel efforts of the American Law Institute and Great Britain’s Royal Commission on Capital Punishment to rewrite the law of murder in order to control discretion. While the Royal Commission’s recommendations did not become law, the Model Penal Code received the endorsement of the Supreme Court¹⁸ and became the model for the new law of capital murder. The discussion focuses on aggravated murder as substantive law and the consequences of choosing felony murder as opposed to premeditation and deliberation as the model for the new law of murder.

Part II briefly recounts the process by which an approach that claimed the parentage of the Model Penal Code became the model for a constitutionally adequate capital punishment statute. To demonstrate how this new model functions and to expose some of its contradictions, this Article considers its application to the facts of the crimes in *McGautha v. California*,¹⁹ (and its companion case, *Crampton v. Ohio*),²⁰ *Furman v. Georgia*,²¹ and *Fisher v. United States*.²²

Part III examines the new law empirically and doctrinally. The problems that troubled the Court in *Furman* have not been cured and some problems may have been exacerbated. The new rules reflect a hopelessness about the ability of our most severe sanction to control crime and a distrust of the ability of sentencers to make sophisticated moral judgments. They replace choice with bad effects as the underlying principle of the criminal justice system. The rules, on paper and in practice, confirm Justice Harlan’s skepticism about our capacity to fashion rules that will make us comfortable about the fairness and equality with which capital punishment is imposed. The demands of fairness and equality continue to point to the abolition, not the reworking, of capital punishment.

I. SOURCES OF THE NEW LAW OF MURDER

Until the beginning of the 1970’s, the law of murder in this country dealt with capital punishment in two steps. First, the crime of murder was divided into degrees, and capital punishment was reserved solely for those guilty of

18. *Gregg v. Georgia*, 428 U.S. 153, 193-95 (1976).

19. *McGautha*, 402 U.S. 183 (1971).

20. *Id.*

21. *Furman*, 408 U.S. 238 (1972).

22. *Fisher*, 328 U.S. 463 (1946).

first-degree murder. Second, juries had discretion as to whether to sentence a defendant guilty of first-degree murder to death. The jury made this decision in the same proceeding and at the same time as it determined guilt. This system, referred to as "grading and discretion," had its critics, and in 1959 the American Law Institute's Model Penal Code Project proposed what appeared to be a very different model for imposing capital punishment. That model provided some of the structure and most of the legitimacy for the capital statutes that the Supreme Court ultimately approved. To understand the new law, it is important to understand what was thought to be wrong with the law of murder and how the Model Penal Code proposed to cure these difficulties.

A. The Rejection of the Division of Murder into Degrees

The traditional law of murder employed two tests to distinguish between those who could be executed (first-degree murderers) and those who could not: the existence of premeditation and deliberation, and the doctrine of felony murder.²³ Pennsylvania began the practice at the end of the eighteenth century in order to ameliorate the harshness of the law and limit capital punishment. Its statute was both seminal and typical:

All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree. All other kinds of murder shall be murder in the second degree. . . . Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict.²⁴

As of 1959, thirty-four states employed a murder statute modeled on or closely resembling the Pennsylvania formula.²⁵ Forty-one of the forty-three states embracing capital punishment in 1959 provided for discretionary rather than mandatory death sentences.²⁶ A death sentence was carried out in a "trivial fraction" of the cases in which it could have been imposed.²⁷ Nonetheless, in an apparent effort to make capital punishment more consistent and less unequal,²⁸ the Model Penal Code rejected the then contemporary approach to capital punishment in favor of an approach that gave the jury guidance by employing the behavioral model of criminality typical of felony murder. This decision had important implications for the new law of murder

23. Tent. Draft No. 9, *supra* note 4, at 27. For a discussion and comparison of the doctrines in terms of their contribution to an identification of the most evil offenders, see Samuel H. Pillsbury, *Evil and the Law of Murder*, 24 U.C. DAVIS L. REV. 437 (1990).

24. PA. STAT. ANN. tit. 47, § 4701 (1945), *reprinted in* Tent. Draft No. 9, *supra* note 4, at 99.

25. Tent. Draft No. 9, *supra* note 4, at 66.

26. *See id.* at 63, 66.

27. *Id.* at 63.

28. MODEL PENAL CODE § 210.6 and commentary at 114-17.

in terms of the nature of the evidence necessary for a conviction of capital murder, the moral basis for distinguishing between capital and other murders, and the paradigmatic perpetrator-victim mix.

1. Premeditation vs. Felony Murder as a Basis for Identifying the Death Eligible: Evidentiary Concerns

The premeditation and deliberation formula, the critics suggested, did not adequately identify the most serious murders because it did not provide the sentencer with any meaningful way to distinguish between murders. Most courts did not require the passage of any appreciable time before the killing in order for the jury to find that the defendant had deliberated.²⁹ In these states a jury that found that the defendant intentionally killed the victim could, from that factual finding alone, arrive at a verdict of first-degree murder.³⁰

Suppose that the evidence demonstrated that the defendant saw the victim on the street, drew a knife, and attacked the victim, killing him. The defendant did not take the stand, and his conduct remained unexplained. In these circumstances, the defendant could be found guilty of first-degree murder under the premeditation formula. The jury would have to draw but two inferences. The first is that people intend the natural and probable consequences of their actions: Because the defendant struck the victim with a deadly weapon, the jury may infer that he intended to kill. The second inference is that because a moment passed between his reaching for his knife and his striking the victim, he had the opportunity to premeditate and, in fact, did so.³¹

Thus the premeditation and deliberation formula resulted in giving the jury unguided discretion to return first-degree murder. Critics such as Justice Cardozo objected to giving the jury this discretion under "a cloud of mystifying words" such as "premeditation," "deliberation," and "malice aforethought" rather than directly.³² After all, a jury might not understand

29. *E.g.*, *Commonwealth v. Tucker*, 76 N.E. 127, 141 (Mass. 1905) (*quoted in* Tent. Draft No. 9, *supra* note 4, at 69) ("It is not so much a matter of time as of logical sequence. First, the deliberation and premeditation, then the resolution to kill, and lastly the killing in pursuance of the resolution; and all this may occur within a few seconds."); *accord*, *Sandoval v. People*, 192 P.2d 423 (Colo. 1948); *People v. Donnelly*, 210 P. 523 (Cal. 1922); *see Pillsbury, supra* note 23, at 453-54.

30. *See, e.g.*, *State v. Ramseur*, 524 A.2d 188, 222-23 (N.J. 1987) (noting that under the premeditation and deliberation standard, only a "rare" murder did not support either first-degree or second-degree murder).

31. "It matters not how short the interval [between the determination to kill and the infliction of the mortal wound], if the time was sufficient for one thought to follow another . . ." *Sandoval*, 192 P.2d at 424-25.

32. Benjamin N. Cardozo, *What Medicine Can Do for Law*, Address Before the New York Academy of Medicine (Nov. 1, 1928), *in* *LAW AND LITERATURE* 70, 100-01 (1931).

If intent is deliberate and premeditated whenever there is choice, then in truth it is always deliberate and premeditated, since choice is involved in the hypothesis of the intent. What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them

that it had been given discretion to choose between life and death and instead tender its verdict based upon an effort to comprehend and apply the premeditation formula.

A first-degree felony murder conviction requires evidence of something more than a killing, namely evidence of a separate crime. Felony murder, then, provides a factor beyond the killing which differentiates it from all other murders. A jury that found as a fact that defendant's act caused the victim's death could not, from that fact alone, draw the inferences that would permit it to find the defendant guilty of first-degree murder under a felony murder theory. To the extent that the problem with capital punishment was the unlimited ability of the prosecutor to charge and the jury to convict *any* intentional killer of capital murder, felony murder provided an approach to solving the problem.³³ Whether it was a good approach depended on whether a felony circumstance or comparable objective aggravating factors did a good job of identifying those who should die.

2. Premeditation vs. Felony Murder as a Basis for Identifying the Death Eligible: Moral Blameworthiness

Even if courts required evidence of actual premeditation and deliberation,³⁴ critics objected that the presence of premeditation did not necessarily signal that the defendant was in the class of the most morally blameworthy killers while its absence did not necessarily mean that the defendant was not in that class. As the Royal Commission on Capital Punishment put it, the premeditation and deliberation formula was "too wide and too narrow."³⁵ Premeditation and deliberation treated the premeditated murderer as more depraved than one who killed on impulse. This moral ordering made the greatest amount of sense if one assumed that those who kill impulsively do so because they are in some comprehensible way provoked or upset. Such killers have traditionally been treated as less morally culpable than the unprovoked, premeditated killer.³⁶ However, there is a third category of intentional killers: those who

directly and not in a mystifying cloud of words. . . . Upon the basis of this fine distinction with its obscure and mystifying psychology, scores of men have gone to their death.

Id.

33. This is not much of an achievement. If the only goal is to narrow the class of those who are eligible for death, then a variety of approaches would suffice, including killing only those whose names began with the letter "A." Ledewitz, *supra* note 10, at 353. "Such a statutory aggravating circumstance [a last name beginning with the letter "A"] would narrow the class, but to no coherent purpose. One can judge whether a statutory aggravating circumstance narrows enough only by understanding what substantive limits there are, if any, on which members of the . . . pool may be considered for the death penalty." *Id.*

34. *People v. Anderson*, 447 P.2d 942 (Cal. 1968), is a leading example of this approach. The court identified three categories of evidence as relevant to the question of whether the defendant premeditated: (a) evidence of planning activities; (b) the existence of a prior relationship from which a motive can be inferred; and (c) the manner of the killing. *Id.* at 949.

35. ROYAL COMM'N, *supra* note 1, at 175.

36. One could also suggest that such killers are less likely to be deterred than the premeditated murderer. See Tent. Draft No. 9, *supra* note 4, at 63. However, just because a killer may have been

kill impulsively for no comprehensible reason. These people may be even more cruel, dangerous, and depraved than the premeditated killer who plans the crime in advance.³⁷

Given this landscape of murderers, premeditation and deliberation does not appear to serve a useful function. If the law provides a broad definition of the provocation that reduces murder to manslaughter and gives full play to the defenses of diminished capacity and diminished responsibility (as does the Model Penal Code),³⁸ the premeditation and deliberation formula is not needed to save the provoked killer from possible execution. Such a killer will not be guilty of murder at all. This leaves the premeditated killer and the unprovoked impulsive killer, and there is no reason to believe that one who plans to kill is more deserving of capital punishment than one who kills on impulse. Indeed, the very act of considering whether to kill might suggest that the decision to take life was uncharacteristic or might suggest that the killing was undertaken with good motives, as in a mercy killing.³⁹ Based on this

beyond the influence of the criminal law does not mean that the state's execution of that person will not deter others who are subject to such influences. H.L.A. Hart, *Murder and the Principles of Punishment: England and the United States*, 52 Nw. U. L. REV. 433, 451 (1957).

37. As James F. Stephen wrote:

As much cruelty, as much indifference to the life of others, a disposition at least as dangerous to society, probably even more dangerous, is shown by sudden as by premeditated murders. The following cases appear to me to set this in a clear light. A, passing along the road, sees a boy sitting on a bridge over a deep river and, out of mere wanton barbarity, pushes him into it and so drowns him. A man makes advances to a girl who repels him. He deliberately but instantly cuts her throat. A man civilly asked to pay a just debt pretends to get the money, loads a rifle and blows out his creditor's brains. In none of these cases is there premeditation unless the word is used in a sense as unnatural as 'aforethought' in 'malice aforethought', but each represents even more diabolical cruelty and ferocity than that which is involved in murders premeditated in the natural sense of the word.

3 JAMES F. STEPHEN, *A HISTORY OF THE CRIMINAL LAW* 94 (London, MacMillan 1883) cited in ROYAL COMM'N, *supra* note 1, at 175.

This group can also be seen as beyond the deterrent effect of the criminal law. They are the ones who commit "crimes of such depravity that the actor reveals himself as doubtfully within the reach of influences that might be especially inhibitory in the case of an ordinary man." Tent. Draft No. 9, *supra* note 4, at 63-64. Again, that the killer himself was beyond deterrence does not mean that executing such a killer would not deter others.

38. The doctrine of diminished capacity relates to one's ability to have the requisite mens rea for a given crime. Section 4.02(1) of the Model Penal Code permits the introduction of evidence of mental disease or defect whenever it is relevant to whether the defendant did or did not possess the requisite mens rea. MODEL PENAL CODE § 4.02(1). Section 4.02(2), along with 210.4(b) and (g), embrace the doctrine of diminished responsibility which permits the jury to consider evidence of the effect of mental disease, defect, or intoxication on the defendant's capacity to appreciate the wrongfulness of his conduct in determining whether to sentence the defendant to death. *Id.* §§ 4.02(2), 210.4(b), 210.4(g).

Section 210.3(b) propounds an expansive view of provocation. It defines as manslaughter:

[A] homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

Id. § 210.3(b).

39. Tent. Draft No. 9, *supra* note 4, at 70.

[A]n impulsive killing, resting on the slightest provocation, hardly presents a stronger case for mitigation than a homicide committed after genuine internal struggle in response to a strong provocation (in the largest sense of the extrinsic causes of homicide). The very fact of the internal struggle may be evidence that the defendant's homicidal impulse was entirely

reasoning, the Model Penal Code rejected premeditation and deliberation as the basis for distinguishing the death eligible from other murderers.⁴⁰

At the aspirational level at least, the premeditation and deliberation formula had important virtues. By providing the most extreme punishment for those who deliberately chose to take life, it reinforced the fundamental principle that those who set out to violate the interests of others are more deserving of punishment than those who do so accidentally.⁴¹ Second, premeditation and deliberation focused the deterrent power of capital punishment on those who had the opportunity to reflect on the consequences of their actions. The conclusion that the criminal law might not influence the behavior of many murderers provides no justification for failing to treat with maximum seriousness those offenders who had an opportunity to reflect upon what they were doing and chose to do it anyway. At its core, the premeditation and deliberation formula represented an effort to serve both moral (retributive) and utilitarian (deterrence) goals.

The felony-murder doctrine served neither goal as well as the premeditation and deliberation formula. It had two doctrinal functions. First, killings which occurred during the commission of specified felonies were treated as murder even if the defendant lacked the *mens rea* required for murder. The commentary to the original draft of the Model Penal Code noted that a principled argument for using a felony to find "constructive malice" is hard to find.⁴² This felony-murder doctrine broadens the range of acts that constitute murder because it eliminates the need to establish that the killing would have been murder in the absence of the accompanying felony.⁴³ After first turning all killings during a felony into "murder," felony murder performed its second doctrinal function by elevating these "murders" into murders in the first

aberrational, far more the product of extraordinary circumstances than true reflection of the actor's normal self.

ROYAL COMM'N ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE, 1952, at 785 [hereinafter 1952 MINUTES OF EVIDENCE] (statement of Professor Herbert Wechsler), *quoted in* ROYAL COMM'N, *supra* note 1, at 175.

40. Tent. Draft No. 9, *supra* note 4, at 68-70. The Royal Commission on Capital Punishment (1949-1953) came to the same conclusion. The commission's task was to determine whether it was possible to modify the English law of murder (which called for mandatory death) in light of the reality that nearly half of those convicted of murder were spared through executive clemency. ROYAL COMM'N, *supra* note 1, at 4-14. The commission rejected dividing murder into degrees through the premeditation and deliberation formula. *Id.* at 174-75. It proposed elimination of the felony-murder doctrine and an expanded test for provocation that could reduce murder to manslaughter. *Id.* at 213-14.

41. As the New Jersey Supreme Court has noted:

Our system of criminal laws is predicated usually on the imposition of punishment based on the defendant's intent. Indeed, our Code's ranking of crimes by degree places those crimes committed with intentional conduct as the highest degree of crime, for which the defendant is most severely punished. Society's concern, the community's concern, the Legislature's concern, is to punish most harshly those who *intend* to inflict pain, harm and suffering—in addition to intending death.

State v. Ramseur, 524 A.2d 188, 230 (N.J. 1987) (emphasis in original).

42. Tent. Draft No. 9, *supra* note 4, at 37.

43. Samuel Pillsbury notes that the premeditation and deliberation formula focuses almost exclusively on rationality, and that felony murder focuses almost exclusively on motive. He argues that we need to focus on both. Pillsbury, *supra* note 23, at 439.

degree. In essence, the mens rea necessary to establish the underlying felony became the mens rea sufficient to establish that the killing was murder. Then, the felony circumstance converted the murder into first-degree murder.

Because it eliminated any mens rea requirement beyond that for the underlying felony, felony murder as "constructive malice" swept within its reach accomplices who had no role in any killing and raised the possibility that a co-defendant could be guilty of first-degree murder when an accomplice died at the hands of the police. It turned accidental killings into first-degree murder.⁴⁴ In addition, felony murder eliminated provocation and self-defense as ameliorating factors for non-accidental killings. The doctrine compounded its blurring of moral lines with the lack of a coherent focus as a deterrent. Because empirical data establishing that killings in general and accidental killings in particular occurred frequently during the commission of felonies was lacking, trying to stop such killings through the threat of capital punishment appeared ineffective and excessive.⁴⁵

In its second role, converting murder into first-degree murder, felony murder operated like premeditation and deliberation. For those killings that would not otherwise have been murder, this second step compounded the moral obtuseness of felony murder. This aspect of the doctrine was less objectionable for that small subset of cases involving a killing that was murder during a felony (for example, not accidental, provoked, or in self-defense) but which was not the product of premeditation and deliberation. In such a case, the existence of a contemporaneous violent felony supplied the missing element necessary to make the crime first-degree (capital) murder. Principled arguments for treating these cases as first-degree murder may well exist.⁴⁶ In essence, the anti-social behavior reflected in the independent felony served to distinguish the killing from, and to label it as worse than, the ordinary murder. Whatever the argument, evidence suggested that juries gave felonious circumstances considerable weight.⁴⁷

44. "It [the traditional delineation of capital murder] is too broad . . . insofar as felony-murder includes unintentional homicides caused by conduct which creates small risk of fatal injury or which are even truly accidental." Tent. Draft No. 9, *supra* note 4, at 68.

45. The commentary to the Model Penal Code notes that then current studies of crime in Philadelphia between 1948 and 1952 indicated that .5% of all robberies, .35% of all rapes, and .0036% of all burglaries were accompanied by homicides. It also notes that death was imposed in one-seventh of the cases involving homicide and robbery or rape. *Id.* at 38-39. Employing the penalty for first-degree murder to control conduct that causes death this infrequently makes neither theoretical nor practical sense, particularly because conduct that has a greater chance of causing death, such as driving recklessly while intoxicated, does not receive felony murder treatment.

An alternative formulation of the deterrence argument focuses not on controlling accidental killings, but on preventing the underlying felony. Such an approach fails to emphasize features of the conduct that the defendant can control—such as the use of a deadly weapon—in favor of features that she cannot control. Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 452 (1985).

46. See Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1271-72 (1937).

47. See MARVIN E. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 243 (Patterson Smith series in Criminology, Law Enforcement, and Social Problems, Pub. No. 211, 1975). Wolfgang found that out of 588 homicides committed in Philadelphia over a four-year period (1948-52), seven resulted in death sentences. Juries imposed six of these seven death sentences in felony murder cases, which totaled 57.

Despite these criticisms,⁴⁸ the Model Penal Code retained felony murder in its broad form *and* eliminated premeditation. Instead of permitting the mens rea for the felony to suffice as the mens rea for murder, the Code required a finding of at least gross homicidal recklessness to support a conviction for murder. A defendant's participation in particular felonies gave rise to a presumption of gross recklessness, which the defendant was free to contradict.⁴⁹ Thus, the Code inserted the step of requiring a finding of "gross homicidal recklessness" between the finding that the defendant participated in a felony and the finding that the defendant was guilty of murder. The Code also embraced the second function of the felony-murder doctrine. A felony circumstance converted an ordinary murder into capital murder. Indeed, the objective and non-evaluative features of felony murder became the hallmark of the new law of homicide.

3. Premeditation vs. Felony Murder as a Basis for Selecting the Death Eligible: Victims

One other distinction between an approach focusing on premeditation and one focusing on felony murder requires mention. The two doctrines contemplate different victims. The notion of premeditation and deliberation, if taken at all seriously, focuses attention on those killings in which the murderer has thought about ending the victim's life before the act of taking that life. Typically, this means that the defendant had a relationship with the victim

Id. at 243. The more than 500 remaining homicides apparently led to a single death sentence. *Id.* at 305.

48. The 1980 commentary, as opposed to the Code, carried forward the ringing critique of felony murder, noting that there were even "graver" objections to it than to premeditation and deliberation. "Punishing some instances of felony murder as a capital crime simply compounds the fundamental illogic and unfairness of this rule of strict liability." MODEL PENAL CODE § 210.6 commentary at 128-29 (footnote omitted).

49. Section 210.2. Murder

(1) Except as provided in [the section dealing with manslaughter], criminal homicide constitutes murder when:

(a) it is committed purposely or knowingly; or

(b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.

MODEL PENAL CODE § 210.2. The provisions regarding felony murder have been characterized as a "symbolic compromise" between political reality (the popularity of felony murder with prosecutors) and the Code's "unified and coordinated doctrine of *mens rea*." Franklin E. Zimring & Gordon Hawkins, *Murder, the Model Penal Code, and Multiple Agendas of Reform*, 19 RUTGERS L.J. 773, 782-83 (1988). The principal author of the Code admitted "a certain sense of concession to political necessity" in the creation of a presumption but suggested that the presumption was also "principled" because the best argument for felony murder is that the underlying felony involves a homicidal risk. While the commentary does not clarify the point, the reasoning underlying the approach suggests that the presumption would shift the burden of production to the defendant to demonstrate the lack of extreme indifference to human life. Whether this makes much sense or represents an improvement over the traditional formula might not be a critical point because only one state, New Hampshire, has adopted this approach to felony murder.

that preceded their fatal interaction and that the decision to take the victim's life arose out of that relationship. The classic relationship that gives rise to such feelings is an intimate one, and the classic victim is a spouse or a lover.⁵⁰

At the other extreme, to the extent that the killing was not anticipated, the classic victim of a felony murder is the felony victim or a bystander. Whether or not the killing was anticipated, the victims are likely to be strangers because most felons would prefer to commit their crimes against people unlikely to identify them.⁵¹ Thus, the paradigmatic victim of a premeditated killing is an intimate, and the paradigmatic victim of a felony murder is a stranger.

B. *The Rejection of Discretionary Sentencing*

Discretionary sentencing, like the division of murder into degrees, came into the law as a technique for limiting the practice of capital punishment. In this country, the sentencer typically had complete discretion as to whether to impose life imprisonment or death.⁵² On its face, this approach seemed humane and sound.⁵³ Indeed, just a few years before the Model Penal Code Project sought to remedy the perceived deficiencies of unrestricted discretion, a comparable group in Great Britain—The Royal Commission on Capital Punishment (“Commission” or “Royal Commission”)—recommended changing the British system to give juries precisely such discretion.⁵⁴

Two factors help explain the difference between the recommendations of the Royal Commission and the Model Penal Code (“Code”). First, unlike murder in the United States, murder in Great Britain carried a mandatory death

50. *Compare* *People v. Anderson*, 447 P.2d 942, 949 (Cal. 1968) (identifying the importance of a prior relationship and the motive it suggests for a finding of premeditation and reversing a first-degree murder conviction when evidence of such a prior relationship is lacking) *with* *People v. Cole*, 301 P.2d 854, 858-59 (Cal. App. 1956) (upholding first-degree murder conviction where there is evidence of an intimate relationship giving rise to a motive for wanting the victim dead).

51. A comprehensive study of homicides in Philadelphia published in 1958 provided stark evidence of this point. Of the more than 500 homicides studied, the victim was a stranger in more than three-fourths (42 out of 57) of the felony homicides. For all homicides (including felony murders), the victim was a stranger in only one out of eight cases. WOLFGANG, *supra* note 47, at 243.

52. Tent. Draft No. 9, *supra* note 4, at 66.

53. The commentary to the Model Penal Code was far more expansive regarding the problems of discretion in its 1980 incarnation than in its original, 1959 form. The 1959 commentary focused its energy on the defects of the premeditation/felony murder formula; jury discretion was seen as positive:

As jury discretion operates in the United States, it produces, as Thorsten Sellin has shown, a relatively small proportion of capital convictions. Given the numbers of murders prosecuted annually, this bespeaks widespread reluctance to impose capital punishment, which further bespeaks a strict screening of the cases in which a sentence has been sought.

Id. at 73-74 (footnote omitted). The 1980 commentary, reflecting the Supreme Court decisions of the preceding decade, noted that: discretion included the possibility of abuse and uninformed discretion heightened that possibility; a lack of consistency in decisions may give rise to a claim of unfairness in any given case; and a lack of predictability undercuts any possible deterrent impact. MODEL PENAL CODE § 210.6 commentary at 132.

54. ROYAL COMM'N, *supra* note 1, at 214. In 1948, the British Government created the Royal Commission on Capital Punishment, which met from 1949 to 1953, heard testimony from hundreds of witnesses, reviewed thousands of pages of written materials and studies, and issued a 500-page report.

sentence. Moreover, in England (but not in Scotland), if the evidence supported a charge of murder the prosecutor had no discretion to charge a different offense.⁵⁵ Yet nearly half (45.7%) of all people sentenced to death between 1900 and 1949 received executive commutation of their sentences.⁵⁶ The Commission's challenge was to see whether the law, as opposed to executive discretion, could be the instrument that narrowed the application of the death sentence to those who actually should die. It concluded that the substantive law could not do so for two reasons. First, the elements which determine whether death is appropriate can never be determined from the criminal act alone.⁵⁷ Second, there was no definition of murder that was not "too wide and too narrow." Therefore, the Commission recommended giving the jury the unfettered discretion to choose life imprisonment or death with the Home Office⁵⁸ retaining the power of executive clemency.⁵⁹

The second difference between the British situation and that confronting the drafters of the Code involved the perceived results of discretionary decisions. The Royal Commission concluded that the results of the British system were "broadly satisfactory. Though opinions will inevitably differ about particular cases, the final decision on the issue of life or death is generally felt to be just and reasonable."⁶⁰ In England, there was centralized control over the decision to prosecute and the decision to commute. Moreover, those in charge of the decision to prosecute insisted that fact situations justifying a charge of

55. *Id.* at 7.

56. *Id.* at 13.

57. *Id.* at 174.

The crux of the matter is that any legal definition must be expressed in terms of the objective characteristics of the offence, whereas the choice of the appropriate penalty must be based on a much wider range of considerations, which cannot be defined but are essentially a matter for the exercise of discretion.

Id. at 173. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978); and *Woodson v. North Carolina*, 428 U.S. 280 (1976) are the contemporary, constitutional manifestations of this principle.

58. The Home Office is one of the Major Departments of English Government and is headed by the Home Secretary. During the time period studied by the Royal Commission, its duties included, among others, "[t]he supervision (other than judicial) of the administration of justice, advice to the King upon the exercise of the prerogative of mercy, [and] the supervision of police, prisons and reformatories . . ." 10 *ENCYCLOPEDIA BRITANNICA* 572 (1947).

59. ROYAL COMM'N, *supra* note 1, at 213-14. The Commission suggested (a) that the doctrine of constructive malice (felony murder) be eliminated; (b) that the jury be permitted to return a manslaughter verdict in a case where a reasonable person would be provoked, even if by words alone; (c) that "aiding and abetting suicide" should be a substantive crime other than murder; (d) that the M'Naghten test be expanded to take account of mental illness which affected behavioral controls; (e) that people under 21 at the time of the crime not be eligible for execution; and (f) that the jury be given the discretion to choose between life and death in any murder case. *Id.*

The Commission rejected any notion that the crime of murder be divided into degrees with the death penalty reserved for first-degree murders only. *Id.*

60. *Id.* at 213. Not all would agree with this conclusion. *See, e.g.,* Hart, *supra* note 36, at 460 n.50 (1957) (identifying as important to the movement toward abolition the execution of Timothy Evans and the subsequent disclosure by the then Home Secretary that he erred in denying a reprieve because he later came to believe that Evans was innocent); Sidney Prevezer, *The English Homicide Act: A New Attempt to Revise the Law of Murder*, 57 *COLUM. L. REV.* 624, 631 n.40 (1957) (referring to the cases of Ruth Ellis and Derek Bentley as particularly troubling examples of the execution of those not considered the most serious of killers).

murder led to just such a charge. In any event, the Royal Commission's recommendations were not followed; instead Parliament adopted a stop gap measure employing the notion of aggravated murder.⁶¹ Capital punishment was finally eliminated in England in 1970.⁶²

C. The Code Approach

The drafters of the Model Penal Code, reflecting upon the American experience with discretionary sentencing, saw arbitrariness and inequality permeating the institution of capital punishment.⁶³ The drafters found a lack of evidence that the death penalty prevented murder, and they found that capital punishment has a "discernible and baneful effect upon the administration of justice" and "deleterious effects on the judicial process."⁶⁴ These factors, combined with the irreversibility of the decision, led the Reporter and the Advisory Committee to find the institution wanting and abolition appropriate.⁶⁵ Nonetheless, because many jurisdictions were likely to retain

61. Homicide Act, 1957, 5 & 6 Eliz. 2, ch. 11 (Eng.). The Homicide Act followed the recommendation of the Royal Commission insofar as it eliminated "constructive malice" but not with respect to diminished responsibility. The Homicide Act embraced the notion of diminished responsibility in the case of murder alone, an approach not recommended by the Commission.

The Homicide Act reserved the death penalty for those murders committed (a) in the course of or furtherance of theft; (b) by shooting or causing an explosion; (c) while resisting, avoiding or preventing arrest or escaping from lawful custody; (d) against a police officer; (e) by a prisoner killing a prison officer; or (f) by one who had been convicted of murder on a different occasion. For a discussion and analysis of the Homicide Act, see D.W. Elliott, *The Homicide Act 1957*, 1957 CRIM. L. REV. 282, and Prevezer, *supra* note 60.

62. Murder (Abolition of Death Penalty) Act, 1965, ch. 71 (Eng.).

63. The Model Penal Code drafters wrote:

Beyond these considerations, it is obvious that capital punishment is the most difficult of sanctions to administer with even rough equality. A rigid legislative definition of capital murders has proved unworkable in practice, given the infinite variety of homicides and possible mitigating factors. A discretionary system thus becomes inevitable, with equally inevitable differences in judgment depending on the individuals involved and other accidents of time and place. Yet most dramatically when life is at stake, equality is, as it is generally felt to be, a most important element of justice.

Tent. Draft No. 9, *supra* note 4, at 64 (footnote omitted).

This "most important element of justice" was in considerable jeopardy under the then existing scheme of capital punishment. The Model Penal Code Project had commissioned a report by Thorsten Sellin to assist it in its consideration of the issue. While most of the report focused on studies dealing with the deterrent effect of capital punishment, the report included statistics breaking down by race those who had been executed between 1930 and 1957. Of the 3096 people executed for the crime of murder, 1516 (nearly 50%) were African American. In the South, where 55% of all executions occurred, more than two out of three of all those put to death were African American. In situations where the murder was accompanied by a rape, 411 men had been executed between 1930 and 1957, 370 (90%) of whom were African American. In Georgia, the figure was 95% (54 out of 57). THORSTEN SELLIN, *THE DEATH PENALTY 6-7* (1959), reprinted in Tent. Draft No. 9, *supra* note 4, at 220.

The Code restricted capital punishment to murder. MODEL PENAL CODE § 210.6. The Supreme Court, in *Coker v. Georgia*, 433 U.S. 584 (1977), followed this principle in rejecting death as a penalty for the crime of rape.

64. Tent. Draft No. 9, *supra* note 4, at 64.

65. *Id.* at 65. On the other side of the ledger, the drafters of the Model Penal Code identified factors in favor of the death penalty: (a) the lack of evidence that death does *not* deter given the intuitive sense that it should; (b) the need to express moral condemnation, and; (c) the need to prevent vigilantism. *Id.* at 64-65. Weighing these considerations, the Reporter favored abolition as did the Advisory Committee

capital punishment for years to come, the authors thought they should provide for the practice in the Code.⁶⁶

The drafters of the Code addressed the problem of discretion in three ways. First, they followed the Royal Commission by employing a bifurcated sentencing procedure so that the jury could hear all relevant evidence without fear that it would contaminate the guilt determination process.⁶⁷ Second, they provided guidance for the sentencer by creating a class of capital murder consisting of murder plus a finding of any one of eight aggravating circumstances.⁶⁸ Third, they rejected the notion of leaving the jury's discretion unguided because doing so might award "disproportionate significance" to the aggravating circumstances.⁶⁹ Instead, the drafters sought to guide the discretion of the sentencer by requiring her to find both that an aggravating circumstance existed and that, in light of the eight statutorily defined mitigating circumstances and any other facts deemed relevant, "there are no mitigating circumstances sufficiently substantial to call for leniency."⁷⁰

The Model Penal Code's eight aggravating circumstances⁷¹ form the core

by an 18-2 vote. The American Law Institute itself took no position on capital punishment. *Id.* at 65. For a description of these events, consult MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 20-23 (1973).

The Royal Commission took no position on whether capital punishment should be abolished because its Terms of Reference postulated the retention of capital punishment and required the Commission to consider how its use might be limited or modified. ROYAL COMM'N, *supra* note 1, at 4. The Commission arose out of a political impasse. Faced with a Labour Government committed to ending capital punishment and a House of Lords committed to maintaining it, the British Government in 1948 created the Royal Commission on Capital Punishment, which issued a 500-page closely reasoned report after about four years of study.

66. Tent. Draft No. 9, *supra* note 4, at 65. Zimring and Hawkins argue that, in view of this opposition, the Code might have distanced itself more from the effort to legitimate capital punishment. "[I]t would have been possible to organize the attempt to reduce the chaos in capital sentencing in ways less likely to be interpreted as an endorsement of the penalty." Zimring & Hawkins, *supra* note 49, at 796.

67. Tent. Draft No. 9, *supra* note 4, at 74.

68. *Id.* at 71 (referring to constructing a "class of capital murder"). Justice Harlan recognized this feature of the Code in his *McGautha* opinion. *McGautha v. California*, 402 U.S. 183, 206 n.16 (1971). Today, of course, "[c]apital murder is murder plus one fact in aggravation." Stephen Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C. DAVIS L. REV. 1037, 1061 (1985).

69. Tent. Draft No. 9, *supra* note 4, at 72.

70. MODEL PENAL CODE § 210.6(2).

71. *Id.* § 210.6(3). For an analysis of the Code's treatment of these circumstances and an extremely critical evaluation of the reasoning which underlies them, see Franklin E. Zimring & Gordon Hawkins, *A Punishment in Search of a Crime: Standards for Capital Punishment in the Law of Criminal Homicide*, 46 MD. L. REV. 115 (1986). "The concepts and categories, the principles, and the vocabulary that explain the model statute are abandoned in the aggravating circumstances discussion. The clarity and precision and dialectical acumen that characterize the treatment of the mitigating circumstances are replaced by bald assertions with scarcely any supporting reasoning." *Id.* at 122.

of the new law of murder.⁷² They are:

1. Murder by a convict in prison;⁷³
2. Murder by one previously convicted of murder or a violent felony;⁷⁴
3. Multiple murders on the same occasion;⁷⁵
4. Knowingly creating a great risk of death to many persons;⁷⁶
5. Murder in an attempt, perpetration, or flight from designated felonies;⁷⁷
6. Murder to avoid or prevent arrest or to escape from lawful custody;⁷⁸
7. Murder for pecuniary gain;⁷⁹ and
8. Murder that is "especially heinous, atrocious or cruel, manifesting exceptional depravity."⁸⁰

The eight mitigating circumstances are:

1. No significant history of prior crime;⁸¹
2. Murder under the influence of "extreme mental or emotional disturbance;"⁸²
3. Victim participated in homicidal conduct or consented to it;⁸³

72. Indeed, killing a police officer, corrections official, or firefighter (26 states) and hiring another to kill (17 states) are the *only* aggravating circumstances not in the Code that are included in the aggravating circumstances of at least half of the states. Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129 app. at 1229-31 (1984) [hereinafter Special Project]. Killing a police officer was included in the English Homicide Act of 1957.

The Special Project lists 34 states as having aggravating circumstances as part of their capital punishment statutes. *Id.* at 1227 n.662. The article is frequently cited as authoritative, however it does contain a few errors. For example, the list erroneously includes Massachusetts, which does not have capital punishment. In addition, Virginia and Texas are not on the list even though they weave aggravating circumstances into the definition of capital murder. The Texas statute identifies murdering a peace officer and murdering for payment as capital murders. TEX. PENAL CODE ANN. § 19.03(a)(1), (3) (West 1989). Virginia takes the same approach. VA. CODE ANN. § 18.2-31(b), (f) (Michie 1990 & Supp. 1993).

73. MODEL PENAL CODE § 210.6(3)(a). Twenty-four states employ aggravating circumstances of this nature. Special Project, *supra* note 72, at 1229 n.676.

74. MODEL PENAL CODE § 210.6(3)(b). As of 1986, 23% of state prisoners incarcerated for murder or non-negligent homicide had a criminal history including a prior violent felony. BUREAU OF JUSTICE STATISTICS, *supra* note 6, tbl. 6.66 at 615. Thirty states employ an aggravating circumstance involving either a prior murder, a prior violent felony, or both. Special Project, *supra* note 72, at 1230 nn.677-78.

75. MODEL PENAL CODE § 210.6(3)(c). Ten states consider this circumstance. Special Project, *supra* note 72, at 1232 n.688.

76. MODEL PENAL CODE § 210.6(3)(d). Twenty-five states consider this circumstance. Special Project, *supra* note 72, at 1231 n.681.

77. MODEL PENAL CODE § 210.6(3)(e). Twenty-six states consider this circumstance. Special Project, *supra* note 72, at 1230-31 nn.679-80.

78. MODEL PENAL CODE § 210.6(3)(f). Twenty-two states consider this circumstance. Special Project, *supra* note 72, at 1228 n.665.

79. MODEL PENAL CODE § 210.6(3)(g). Thirty-three states consider this aggravating factor. Special Project, *supra* note 72, at 1227 n.664.

80. MODEL PENAL CODE § 210.6(3)(h). Twenty-one states currently consider this circumstance. An additional four specify torture, while six consider both "heinousness" and torture. Special Project, *supra* note 72, at 1228-29 nn.668-73. Florida employs "a cold, calculated, and premeditated manner without any pretense of moral or legal justification standard." *Id.* at 1229 n.669 (footnote omitted). In addition, Idaho treats as an aggravating circumstance the fact that the defendant "exhibited utter disregard for human life." *Id.* at 1229 nn.669-70.

81. MODEL PENAL CODE § 210.6(4)(a).

82. *Id.* § 210.6(4)(b).

83. *Id.* § 210.6(4)(c).

4. Defendant believed murder was morally justified or extenuated;⁸⁴
5. Defendant was a relatively minor accomplice in murder;⁸⁵
6. Defendant acted under duress or under the domination of another;⁸⁶
7. Impaired capacity (through intoxication, mental disease, or mental defect) to appreciate criminality of conduct or to conform to the law;⁸⁷
8. Youth of the defendant.⁸⁸

Because an aggravating circumstance must exist in order for a death sentence to be possible, the drafters of the Code did not eliminate the practice of dividing murder into degrees. Rather, they increased the number of divisions from two to eight, retaining felony murder and replacing premeditation with seven other aggravating factors.⁸⁹ Thus, the new law provided eight alternative routes to a capital murder conviction instead of two. This approach cuts a wide swath through potential murderers.⁹⁰ While the list excludes someone who had no prior violent felony history and kills one individual for a non-pecuniary reason in a non-heinous manner, it includes virtually every other murderer.⁹¹

Four circumstances locate aggravation in the harm that the defendant does in addition to killing—an independent felony, a frustration of law enforcement, the killing of an additional person, and the infliction of suffering beyond that necessary to kill. A fifth deals with an attempt to cause such additional harm by knowingly creating a great risk to many persons. These five circumstances parallel felony murder in that the existence of the additional bad act or result replaces the mens rea of premeditation as a justification for taking the crime to a higher level of seriousness.

The three other circumstances cannot be understood on this basis. It may be that killings by those previously convicted of a violent felony and killings for pecuniary gain are manifestations of particularly venal character,⁹² although

84. *Id.* § 210.6(4)(d).

85. *Id.* § 210.6(4)(e).

86. *Id.* § 210.6(4)(f).

87. *Id.* § 210.6(4)(g).

88. *Id.* § 210.6(4)(h).

89. The Reporter's initial proposal had been to "point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case." Tent. Draft No. 9, *supra* note 4, at 71 (emphasis in original). However, the Advisory Committee had called for stricter controls so that, rather than using these factors simply as guides, sentencers would have to establish at least one aggravating factor to justify a death sentence. This created a new class of capital murderers. *Id.*

90. For estimates of the percentage of murders which the Model Penal Code approach covers, see *infra* text accompanying notes 192-200. The Georgia figure of 86% might be a bit high since the Model Penal Code does not recognize a felony-murder doctrine that is as broad as the felony-murder doctrine Georgia recognizes. The Georgia figure, however, probably is not far off the mark.

91. Cf. Michael Mello, *Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller*, 13 STETSON L. REV. 523, 533 (1984) ("The survey [of Florida cases] demonstrates that virtually all reported Florida death cases have been found especially heinous, atrocious or cruel *except* those resulting in instantaneous, unexpected, death not committed 'execution style.'") (emphasis in original).

92. The 1980 commentary to the Code rationalizes death eligibility for those previously convicted of a violent felony on the grounds that such cases evoke "the strongest popular demand for capital punishment." MODEL PENAL CODE § 210.6 cmt. at 136. Moreover, the prior felony "suggests two

why either killer is worse than someone who kills for enjoyment remains obscure. Killings by prisoners seem to lack even this weak rationale, because it apparently does not matter what the prisoner's prior record might have been. Someone serving a sentence for tax fraud who kills a fellow prisoner after an argument is, because of his prisoner status, eligible for death. The rationale here is deterrence.⁹³

The 1959 commentary provided no justification for either the general approach or for the particular aggravating circumstances selected.⁹⁴ Nor did it suggest which problem these new rules solved, although arbitrariness and inequality are the only possible candidates.⁹⁵ With the exception of "pecuniary motive," the requirement that the defendant "knowingly" create a risk of death to many, and the "purpose" to avoid or escape lawful arrest, the

inferences supporting escalation of sentence: first, that the murder reflects the character of the defendant rather than any extraordinary aspect of the situation, and second, that the defendant is likely to prove dangerous to life on some future occasion." *Id.*

93. *Id.*

94. Tent. Draft No. 9, *supra* note 4, at 63-80. The 1980 commentary to the Code presents a melange of rationales. Eligibility for capital punishment is justified primarily in terms of satisfying popular sentiment, preventing future dangerousness, and responding to depravity, manifested either in past conduct or in the circumstances of the current killing. MODEL PENAL CODE § 210.6 cmt. at 136-37; cf. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 339 (1978) (suggesting that eugenics may be an explanation for some aggravating circumstances). Felony murder might be rationalized under the "bad character" or "willingness to risk life" category because it is limited to felonies that involve the prospect of violence, but the commentary does not clarify this point. In addition, it makes no attempt to justify the inclusion of killing for pecuniary gain or in an effort to escape custody. Deterrence is invoked only with respect to killing by prison inmates. MODEL PENAL CODE § 210.6 cmt. at 136-37.

In their seminal work, *A Rationale of the Law of Homicide (I & II)*, 37 COLUM. L. REV. 701 & 1261 (1937), Jerome Michael and Herbert Wechsler (the Reporter for the Model Penal Code) presented an extensive utilitarian analysis of the law of homicide. The authors asserted that homicidal acts could differ from one another in terms of the extent to which they endanger lives or threaten extreme pain, the extent to which they threaten other interests, and the extent to which they serve good ends. *Id.* at 1271-72.

Another element in punishment is the defendant's character, which Michael and Wechsler define as "a man's potentialities for good and evil conduct at whatever time they are estimated." *Id.* at 1272. Michael and Wechsler identify the homicidal act, the degree of intentionality, and the relationship between the ends sought and the homicidal means employed as evidence of character. *Id.* at 1274-80. They also identify age, prior behavior (particularly criminal), the degree of provocation, and the response to the killing as relevant to the severity of sentence. *Id.* at 1280-90. They summarize their conclusions in a chart which recognizes that many of these factors can cut both ways. Thus, they list factors as those "favorable to mitigation" and those "unfavorable to mitigation." *Id.* at 1300.

Most of these factors found their way into the Model Penal Code. The stark exceptions are the factors dealing with intentionality and the gap between means and ends. A gap between means and ends is evident when persons take unnecessarily drastic measures to achieve a goal, such as killing someone to get ahead in line at the movies.

95. Tent. Draft No. 9, *supra* note 4, at 63-80. Nothing in the original commentary to the Code suggests *improved* deterrence as a rationale. *Id.* This is fortunate because nothing in the Code would make this possible. Nothing in the Code's treatment of capital punishment is designed to communicate the new ordering of seriousness to the public. The actual circumstances which make one death eligible are not part of the common fund of knowledge of any but those who work in the area, and this is not the group whom advocates of capital punishment identify as in need of deterrence. Because the aggravating circumstances themselves do not reflect any clear principle, it would be difficult, if not impossible, for an individual to reason her way to the conduct which makes one death eligible.

The other difficulties with capital punishment—the baneful effect on the administration of justice, brutalization, and irreversibility—will continue to exist as long as capital punishment is with us, regardless of the rules governing who dies.

aggravating circumstances do not rest upon any findings concerning the defendant's state of mind. In this, aggravated murder resembles traditional felony murder: once the mens rea for the underlying offense has been established, state of mind becomes irrelevant to the question of whether the crime is capital. Aggravating circumstances are objective and manifest in the sense that each can be established from evidence of what the defendant in fact did. With the exceptions noted, the sentencer has no need to inquire about or infer from the defendant's conduct any motive or other mental state, whether it be purpose or knowledge.

This has two consequences. First, it treats as moral equivalents those who intend to kill during a felony and those who do not. A person who hopes that the robbery can occur without an injury to anyone is just as guilty of capital murder as the robber who plans to kill in order to rob. The person who kills another slowly and painfully through incompetence is just as much a capital murderer as one who does it purposely, for the pure pleasure of it. The second consequence is that, with the exceptions of acting for pecuniary gain or to avoid arrest,⁹⁶ there is no state of mind, however perverse, that can by itself render one death eligible. With rare exceptions, killing for the joy of it is not a capital offense.⁹⁷ Participating in a robbery in which someone accidentally dies is.

Aggravating circumstances reflect the felony murder approach in yet another way. With the exception of the "heinousness" circumstance,⁹⁸ none of them requires the jury to *evaluate* what the defendant did.⁹⁹ Jurors simply need to find that she did it. Premeditation and deliberation left the jury at a loss with respect to exactly what fact needed determination. The new law has solved that difficulty. In the process, like the traditional felony-murder doctrine, it

96. Knowingly creating a great risk to many people requires that the defendant both kill someone and create a great risk to others. The financial gain and avoiding arrest circumstances, on the other hand, appear to turn at least some killings into capital murders based solely upon the defendant's *reason* for killing.

97. Today, in Arizona, killing for the joy of it is an aggravating factor that can justify the death penalty. *State v. Walton*, 769 P.2d 1017, 1033 (Ariz. 1989), *aff'd sub nom. Walton v. Arizona*, 497 U.S. 639 (1990). In Idaho, "cold-blooded" and "pitiless" murder justifies the death sentence. *Arave v. Creech*, 113 S. Ct. 1534, 1541-44 (1993).

98. The Supreme Court has required states to make concrete the concept of heinousness. *Maynard v. Cartwright*, 486 U.S. 356, 360-64 (1988); *Godfrey v. Georgia*, 446 U.S. 420, 428-33 (1980). Many states interpret the Code's notion that the provision was designed to punish the "style of killing" to refer only to torture or the unnecessary infliction of suffering. *See Walton*, 497 U.S. at 652-55. Thus interpreted, it loses its evaluative cast and more closely resembles the other aggravating circumstances. To the extent that the circumstance retains its subjective, evaluative nature, it can be appropriately criticized as a "standardless standard." Rosen, *The Standardless Standard*, *supra* note 10, at 945.

99. Even those contemporary aggravating circumstances which seem to require a moral evaluation of the defendant's conduct apparently do not do so. In *Arave v. Creech*, Justice O'Connor rebuffed the contention that asking the jury to find if someone was "pitiless" or "cold-blooded" was asking them to make a subjective judgment. Distinguishing "atrocious" or "heinous" as unconstitutionally vague terms calling for an evaluation of a crime as a whole, Justice O'Connor insisted that "[t]he terms 'cold-blooded' and 'pitiless' describe the defendant's state of mind: not his *mens rea*, but his attitude toward his conduct and his victim. The law has long recognized that a defendant's state of mind is not a 'subjective' matter, but a *fact* to be inferred from the surrounding circumstances." *Arave*, 113 S. Ct. 1534 (citation omitted) (emphasis in original).

has exacerbated the problem of moral equivalency inherent in any effort to create a capital crime.

The mitigating circumstances do not ameliorate the moral equivalency problem. They have a narrow scope. They are either "imperfect" defenses of duress, insanity, provocation, or juvenile status,¹⁰⁰ or they deal with unusual situations such as mercy killing and Russian Roulette,¹⁰¹ or they point to a minor role in the murder or to a lack of a record. With the exception of the observable facts of youth and lack of a prior record, all mitigating circumstances are essentially subjective.¹⁰² They depend on what the defendant believed and why he acted as he did, factors which the jury need not consider in finding an aggravating circumstance. Given this, the comparison of aggravating and mitigating circumstances presents a considerable challenge.¹⁰³

Unlike aggravating circumstances, but like the defenses they resemble, mitigating circumstances have a large evaluative component. If aggravating circumstances operate like an element of the crime of capital murder, mitigating circumstances operate like affirmative defenses. Because they do not negate either an element of the crime of murder or any aggravating circumstance, they can be ignored unless the defendant (or prosecution) introduces them into the case. Moreover, with the exception of the defendant's youth or lack of a criminal record, the mitigating factors are temporally limited—they concern the defendant's behavior as of the time of the killing and entirely ignore the defendant's history (such as whether the defendant was abused), the social context, and the defendant's response to the crime itself. While the Code would still permit jurors to consider these factors, it does not direct their attention to them. In terms of what the jury is told to consider, aggravating factors dominate.¹⁰⁴

Despite the lack of a "principled argument" for felony murder, and the assertion that it created worse moral problems than premeditation and deliberation, the Code employed felony murder both in its own right and as a model for the new law of capital murder. The Code looked to act and result rather than to purpose and motive in grading murder.

100. MODEL PENAL CODE § 210.6(4)(b), (f)-(h).

101. Section 210.6(4)(c) of the Model Penal Code deals with Russian Roulette or mercy killings, and § 210.6(4)(d) deals with people acting from good motives (for example, euthanasia) or a belief in the moral correctness of their action. *Id.* § 210.6 cmt. at 140-41.

102. While the "relatively minor role in the crime" circumstance could be established simply from external observation of what the defendant did, ultimately a finding as to its existence rests upon a conclusion that what the defendant did was all that he intended or wished to do. MODEL PENAL CODE § 2.06(2)(c), (3)-(7) cmt. at 306-28 (1985). At bottom, then, it is subjective as well.

103. Zimring & Hawkins, *supra* note 71, at 119-21.

104. The marked imbalance between the reach of aggravating and mitigating factors is particularly worthy of concern because the Supreme Court has endorsed what has been characterized as the "nearly mandatory" capital punishment schemes (for example, the jury is instructed that it shall return a death penalty if aggravating circumstances "outweigh" mitigating ones). *Boyd v. California*, 494 U.S. 370 (1990); *Blystone v. Pennsylvania*, 494 U.S. 299, 305-09 (1990). For a useful discussion of the role of mitigating circumstances and the Supreme Court's ambivalence toward them, see Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).

Significantly, the commentary provided no explanation for why the Code's approach to capital punishment solved the problems plaguing that institution. It was (and is) not clear how these factors (felony murder and the seven dwarves) are to combat arbitrariness and inequality except, perhaps, by markedly increasing the number of executions within the defined categories.¹⁰⁵ In any event, the commentary to the original draft spoke primarily in terms of controlling the discretion of juries. It did not mention, much less address, how one might go about controlling the discretion of prosecutors in a decentralized system in which the decision to seek capital punishment is typically made at the county level. In addition to variations within states, there was significant variation among states in their use of capital punishment. As of 1959, the available evidence showed that death was imposed in only a tiny fraction of all cases, and that in the South more than twice as many African Americans as whites had been executed for murder. In the North, more than twice as many whites as African Americans had been executed. With respect to executions for rape, the national ratio was nearly ten African Americans executed to one white.¹⁰⁶ The Code forthrightly limited capital punishment to aggravated homicides, and thus eliminated its use for the crime (rape) which produced the greatest racial disparity.

Beyond this, the elimination of capital punishment for the non-heinous, non-pecuniary killer of a single individual eliminated whatever arbitrariness and discrimination that resulted from the application of the death penalty in this class of cases. The drafters of the Code, however, had nothing before them which suggested that the problems of discrimination and arbitrariness centered on these particular candidates for capital punishment. Nor did they have any basis for the judgment that the crimes they identified as aggravated had or would result in death sentences in a consistent and non-discriminatory manner.

II. THE NEW LAW ENDORSED AND APPLIED

The Model Penal Code's treatment of capital punishment did not immediately commend itself to any state legislature. Justice Harlan pointed to it as a failed effort in his *McGautha* decision rejecting a due process attack on discretionary death sentencing. He noted that, at bottom, the Code provisions "do no more than suggest some subjects for the jury to consider during its deliberations, and they bear witness to the intractable nature of the problem of 'standards' which the history of capital punishment has from the beginning reflected."¹⁰⁷ Justice Harlan noted that the Code had, in effect, created a new class of capital murder, but he did not believe that *McGautha* could

105. This was Justice White's view of what narrowing might achieve. *Gregg v. Georgia*, 428 U.S. 153, 222 (1976) (White, J., concurring in judgment).

106. SELLIN, *supra* note 63, at 6-7.

107. *McGautha v. California*, 402 U.S. 183, 207 (1971). Justice Harlan focused on whether the Code provided meaningful guidance with respect to the ultimate issue of whether a particular defendant should receive the death penalty, and found that it did not. *Id.* at 205-08.

complain that the current first-degree murder statutes were too broad.¹⁰⁸ Everything changed with the *Furman v. Georgia*¹⁰⁹ decision the following year. Five justices, in five separate opinions, agreed that the Eighth Amendment invalidated statutes authorizing the discretionary imposition of death. "Language [in those opinions] yielded support for positions ranging from a conclusion that the death penalty was always unconstitutional to an argument that the only constitutional form of capital punishment was a mandatory death penalty."¹¹⁰ What the opinions shared was the view that *as applied* the system of discretionary sentencing produced unconstitutional results.

In the face of this uncertainty, many states adopted mandatory capital punishment.¹¹¹ In 1976, the Supreme Court changed direction. In *Gregg v.*

108. The question of whether the Model Penal Code effectively identified the *death eligible* was relegated to a footnote. After noting that the Code created a new class of capital murderers, Justice Harlan quickly dismissed the adequacy of this classification as an issue requiring serious consideration:

As we understand these petitioners' contentions, they seek standards for guiding the sentencing authority's discretion, not a greater strictness in the definition of the class of cases in which the discretion exists. If we are mistaken in this, and petitioners contend that Ohio's and California's definitions of first-degree murder are too broad, we consider their position constitutionally untenable.

Id. at 206 n.16.

Justice Brennan noted that Justice Harlan had not explained "why the impossibility of perfect standards justifies making no attempt whatsoever to control lawless action." *Id.* at 282 (Brennan, J., dissenting).

109. *Furman*, 408 U.S. 238 (1972).

110. Sundby, *supra* note 104, at 1151.

111. Poulos, *The Supreme Court*, *supra* note 4, at 200-01. The deliberations of the National Association of Attorneys General are instructive. Its Committee on Capital Punishment did not focus upon a "good" law of capital murder; it sought a system that would pass constitutional muster. The committee concluded that a mandatory death sentence was needed to meet the concerns expressed by the Court in *Furman*, and provided lists of those kinds of killings which it believed had an "excellent," "fair," or "poor" chance of surviving constitutional challenge. The list, set out below, has a familiar ring.

The alternative considered most preferred as best withstanding constitutional attack is a mandatory death penalty for specified offenses . . . It was the consensus of the committee that the following offenses would have the stated chances of success of withstanding constitutional attack:

EXCELLENT

- (1) murder of any peace officer, corrections employee or fireman acting in the line of duty;
- (2) a contract murder committed for pecuniary gain by a defendant after being hired by any person;
- (3) murder by the malicious use or detonation of any bomb or similar destructive device;
- (4) murder committed by a person who had previously been convicted of murder in the first or second degree;
- (5) murder committed by a defendant while under the sentence of life imprisonment;
- (6) murder committed in the perpetration of or attempt to perpetrate a rape, kidnapping, arson, armed robbery, armed burglary or when death occurs following the sexual molestation of a child under 13 years of age;
- (7) murder resulting from the hijacking of an airplane, train, bus, ship or other commercial vehicle;
- (8) multiple slayings;
- (9) murder committed for purpose of avoiding or preventing lawful arrest or effecting an escape from legal custody; and
- (10) murder of a public official.

GOOD

- (1) murder of a public figure.

POOR

Georgia,¹¹² *Proffitt v. Florida*,¹¹³ *Jurek v. Texas*,¹¹⁴ *Woodson v. North Carolina*,¹¹⁵ and *Roberts v. Louisiana*,¹¹⁶ the Court rejected mandatory capital sentencing in favor of a system which involved narrowing the class of murderers down to a group that was death eligible, and then giving the jury (or judge) the discretion, guided or otherwise, to impose life or death. The Court supported procedural protections as well: a separate sentencing hearing, so that the defendant could introduce and the jury could consider mitigating evidence, and automatic and intensive appellate review.

The plurality in *Gregg* rejected the view that standards were impossible by noting the fact that "such standards have been developed," citing the Model Penal Code.¹¹⁷ Curiously, the Justices quoted that part of the commentary calling for aggravating and mitigating circumstances to "be weighed *and weighed against each other*,"¹¹⁸ and then approved the Georgia statute which neither identified mitigating factors, nor called for weighing, nor provided the jury with any other guidance as to how to make the decision about death. While conceding that the Code's standards were "by necessity somewhat general," the Court said, "they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary."¹¹⁹ In the view of Justices Stewart, Powell, and Stevens, the requirement that the jury find an aggravating circumstance "channeled" the jury's discretion and eliminated the possibility of arbitrary and capricious sentences.¹²⁰

(1) murder committed by assassination or by lying in wait; (Explanation: language too broad and better covered by public official or public figure.)

(2) murder that is heinous, atrocious or cruel; (Explanation: language too broad and vague and covered specifically in other ways.)

(3) death proximately resulting from the unlawful distribution of narcotics; and

(4) murders of passion.

NATIONAL ASS'N OF ATTORNEYS GENERAL, SUMMARY OF PROCEEDINGS 60-61 (1973).

The committee believed that mandatory death for deliberate and premeditated killings was a poor second choice for both constitutional and practical reasons. It suggested that states might consider the creation of an independent state Board of Review which would, "acting apart from the triers of fact, determine that the circumstances of aggravation and mitigation are universally applied." *Id.* at 22-23. The Attorneys General, then, advocated an arrangement virtually identical to the 1957 Homicide Act as the approach best designed to meet the Supreme Court's Eighth Amendment concerns. *Id.*

112. *Gregg*, 428 U.S. 153 (1976), *aff'd in part and rev'd in part*, 492 U.S. 302 (1989).

113. *Proffitt*, 428 U.S. 242 (1976), *aff'd in part and rev'd in part*, 492 U.S. 302 (1989).

114. *Jurek*, 428 U.S. 262 (1976), *aff'd in part and rev'd in part*, 492 U.S. 302 (1989).

115. *Woodson*, 428 U.S. 280 (1976), *aff'd in part and rev'd in part*, 492 U.S. 302 (1989).

116. *Roberts*, 428 U.S. 325 (1976), *aff'd in part and rev'd in part*, 492 U.S. 302 (1989).

117. *Gregg*, 428 U.S. at 193. Opponents of capital punishment appearing before the Court had taken this view earlier. MELTSNER, *supra* note 65, at 162-63, 205. Whether it was fair play or not, turnabout occurred in *Gregg*.

118. *Gregg*, 428 U.S. at 193 (citing Tent. Draft No. 9, *supra* note 4, at 71) (emphasis in original).

119. *Id.* at 193-95.

120. *Id.* at 206-07. *Furman* was distinguished:

Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating

Justice White, joined by Chief Justice Burger and Justice Rehnquist, believed that:

[A]s the types of murders . . . become more narrowly defined and are limited to [crimes] which are particularly serious or for which [death] is peculiarly appropriate, it becomes reasonable to expect that juries—even given discretion *not* to impose the death penalty—will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device.¹²¹

Seven years later, the Court made explicit that the Eighth Amendment required *only* the narrowing of death eligibility through the requirement that a jury find an aggravating circumstance.¹²² Since then, the minimal nature of Eighth Amendment requirements has become clear. The central meaning of *Furman* is clear. "*Furman* held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was no principled means provided to distinguish those that received the penalty from those that did not."¹²³ *Gregg*, *Proffitt*, and *Jurek* reduce to two requirements. The pool of murderers must first be narrowed according to criteria that "must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."¹²⁴ Then, once the pool has been narrowed to those who are death eligible, the sentencing phase must "allow[] for the consideration of mitigating circumstances and the exercise of discretion."¹²⁵

To meet the narrowing requirement, the law must require a finding of something different than what the pre-*Furman* murder statutes required; that is, death cannot be imposed for a killing simply on a finding of either an intent to kill, an intent to do grievous bodily harm, an act manifesting an abandoned and malignant heart, or the concurrent commission of a felony. Georgia law authorized death under all of these circumstances, and Georgia law was unconstitutional. Once one identifies an appropriate factor in

circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.

Id. (citation omitted).

121. *Id.* at 222 (Burger, C.J., and White and Rehnquist, JJ., concurring).

122. *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Apparently, the decision as to which factors justify death is a decision for the state legislature, subject to the requirement that the factor be one which cannot reasonably be applied to *all* who are death eligible. *Arave v. Creech*, 113 S. Ct. 1534, 1542 (1993) ("If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm.") (emphasis in original). In *Creech*, the Court upheld the Idaho aggravating circumstance that the defendant exhibited "utter disregard" for human life on the grounds that the Idaho courts had construed this circumstance to apply only to those killings which were "cold-blooded" and "pitiless" and not all of those who were death eligible under Idaho law could be said to meet these criteria. *Id.* at 1542-43.

123. *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988).

124. *Zant*, 462 U.S. at 877.

125. *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988).

aggravation to that law, however, the Eighth Amendment arbitrariness concern is satisfied.¹²⁶ The Court does not appear to insist upon an *additional* factor; subtraction appears to work as well. Narrowing can be achieved either by retaining the traditional categories of murder and adding an aggravating factor *or* by eliminating some of the traditional categories of murder. Major participants in felony murder are apparently death eligible for that reason alone,¹²⁷ as they would have been under pre-*Furman* law. The difference is that the post-*Furman* statute is not as *inclusive* as the pre-*Furman* statute.

The aggravating factor can appear either in the definition of the substantive crime or as a factor to be found during the sentencing phase.¹²⁸ Indeed, the same factor that renders a homicide murder can also serve as the aggravating circumstance which makes one death eligible.¹²⁹

Other than the brief statement in *Zant v. Stephens* that an aggravating circumstance must "reasonably justify" death for this defendant as contrasted to the general run of murderers, the Court has provided little illumination as to whether there are substantive limits on the narrowing criteria.¹³⁰ The

126. *Zant*, 462 U.S. 862.

127. *Tison v. Arizona*, 481 U.S. 137 (1987).

128. *Arave v. Creech* provides the most recent formulation:

When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so. If a sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm.

113 S. Ct. 1534, 1542 (1993) (citation omitted) (emphasis in original).

129. Felony murder raises this problem. In Georgia, for example, the felony-murder doctrine makes a killing capital murder and suffices as an aggravating circumstance. GA. CODE ANN. § 17-10-3(b)(20). *Tison*, 481 U.S. 137, held that the Eighth Amendment required only a "reckless indifference to human life" to support felony murder as an aggravating circumstance. This, of course, embraces a very large portion of all felony murders. To the extent that there is little or no difference between felony murder as it existed in 1972 and the requirements of felony murder as an aggravating circumstance, the technical requirement that there must be a fact in aggravation "in addition" to murder may be satisfied by a fact which was necessarily established in finding the defendant guilty of murder. Rosen identifies Georgia, Florida, Wyoming, and South Carolina as states "in which a defendant can be found guilty of first degree murder under a felony murder theory and in which the same underlying felony can serve as an aggravating factor to justify imposition of the death penalty . . ." Rosen, *Felony Murder*, *supra* note 10, at 1126 n.62.

130. Ledewitz, *supra* note 10, at 349-60; Robert Weisberg, *Deregulating Death*, 1983 S. CT. REV. 305, 328-35 (1984); Scott Howe, *Resolving the Conflict in Capital Cases; A Desert Oriented Theory of Regulation*, 26 GA. L. REV. 323, 384-87 (1992). Professor Howe notes that the narrowing function of the Georgia system approved in *Zant* does not "correspond to any Eighth Amendment principle." *Id.* at 385.

The Court in *dicta* has given a justification for making the killing of a police officer an aggravating circumstance:

To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance. There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property.

. . . .

We recognize that the life of a police officer is a dangerous one. Statistics show that the number of police officers killed in the line of duty has more than doubled in the last 10 years. In 1966, 57 law enforcement officers were killed in the line of duty; in 1975, 129 were killed. *Roberts v. Louisiana*, 431 U.S. 633, 636-37 (1977) (citation omitted).

Court has struggled with the procedural treatment of aggravating circumstances.¹³¹ Nevertheless, the doctrine remains opaque.¹³² What the Court *has* done is create an Eighth Amendment "void for vagueness" doctrine. Constitutionally adequate narrowing has *not* occurred if the jury is permitted to return death upon finding that the crime "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."¹³³ Such criteria are facially vague and violate the Eighth Amendment requirement for specificity.¹³⁴ This criterion

131. The Court refuses to recognize frankly that it has imposed a new doctrine of substantive law. It is plainly true that:

[i]he requirement that there be at least one aggravating circumstance, in addition to the murder itself, has simply led to the creation of a new crime, capital murder, one of whose elements is the aggravating circumstance. Like any element of a crime, it is a fact that a jury must find true beyond a reasonable doubt before a defendant may receive the heightened sentence the new crime carries.

Gillers, *supra* note 68, at 1050.

The Court has ruled that a decision returning a life verdict precludes, on double jeopardy grounds, a sentence of death upon retrial when "the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence . . ." *Bullington v. Missouri*, 451 U.S. 430, 446 (1981); *see also Arizona v. Rumsey*, 467 U.S. 203 (1984). In the non-capital area, a longer sentence following retrial does not violate the double jeopardy clause. *North Carolina v. Pearce*, 395 U.S. 711 (1969). *Bullington* distinguished *Stroud v. United States*, which, in the pre-*Furman* era, found no constitutional violation in sentencing someone to death following a reversal of a conviction that carried an original life sentence. *Stroud*, 251 U.S. 15 (1919). A life verdict precludes a later death sentence even if the reason why death was not imposed was that the sentencer misunderstood the relevant law and failed to find an aggravating circumstance despite evidence which supported it. *Rumsey*, 467 U.S. at 211. Also, the Court has recognized that the state's failure to establish *any* aggravating circumstance makes one "innocent" of capital murder, and therefore eligible for habeas consideration even on a second petition. *Sawyer v. Whitley*, 112 S. Ct. 2514, 2522-23 (1992).

Despite its recognition that aggravating circumstances operate like an element of a crime in the double jeopardy context, the Court has acquiesced in state arrangements that permit a judge as opposed to a jury to determine the existence of an aggravating circumstance. The Court in *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Walton v. Arizona*, 497 U.S. 639 (1990), held that judges as opposed to juries could make both the substantive (the existence of an aggravating circumstance) and sentencing (that death is the appropriate sentence) findings. The Court's views on this subject have been repeatedly and pointedly criticized. Gillers, *supra* note 68, at 1061-95; Poulos, *Liability Rules*, *supra* note 10, at 646-47. *See generally Ledewitz*, *supra* note 10 (analyzing the role of the aggravating circumstance requirement in death penalty cases); Weisberg, *supra* note 130 (discussing the history of the Supreme Court's effort to regulate application of the death penalty).

132. *Ledewitz*, *supra* note 10, at 349-60 suggests what the terms ought to mean. However, the reality is quite different. *See infra* text accompanying note 133 (describing the reach of the Georgia scheme).

It is clear to us, however, that functionally, the aggravating factors in the Act are indistinguishable, for this purpose, from the elements of a crime. For example, no more or no less than premeditation under our prior law, proof of an aggravating factor could mark the difference between imprisonment and death. There is no reason for requiring definiteness in the former but not in the latter.

State v. Ramseur, 524 A.2d 188, 226 n.27 (N.J. 1987) (citation omitted); *accord*, *State v. Silhan*, 275 S.E.2d 450, 482 (Sup. Ct. N.C. 1981).

133. *Godfrey v. Georgia*, 446 U.S. 420, 422 (1980) (quoting GA. CODE § 27-2534.1(b)(7) (1978)); *accord Maynard v. Cartwright*, 486 U.S. 356, 362 (1988).

134. In *Maynard*, 486 U.S. 356, the Court rejected Oklahoma's argument that an aggravating circumstance was not void for vagueness if the conduct in question fell within the core meaning of the statute and was conduct that the state could appropriately sanction. Such an approach might be reasonable under the Due Process Clause, the Court agreed, but the Eighth Amendment required narrowing from among a group of murderers any one of whose act would seem to fall within the core meaning of an aggravated circumstance of "vileness."

can be rescued if a state court gives it a narrowing construction.¹³⁵ The Court has not invalidated any other aggravating circumstance on the grounds that the circumstance does an inadequate job of narrowing.¹³⁶

The ultimate decision to impose capital punishment on a given individual remains essentially where it was before *Furman*; like the law of murder that it replaces, aggravating circumstance murder identifies the death eligible and opens the door to consideration of whether the person should actually die.¹³⁷ Some states require that the aggravating circumstances be balanced with identified mitigating factors,¹³⁸ other states provide no guidance,¹³⁹ and others let the lethal decision turn on the sentencers' predictions as to future dangerousness.¹⁴⁰ The death sentence might even be "nearly mandatory" in the sense that the jury is instructed to return death if aggravating factors outweigh mitigating ones.¹⁴¹ To the extent that these approaches usefully guide the sentencers' discretion, and to the extent that the bifurcated trial facilitates a full consideration of relevant evidence, perhaps the current system improves what it replaced. If so, that improvement is in the process of choosing *among* the death eligible; it is not in the process of determining who is in that category. The very proposal that the drafters of the Model Penal Code rejected—a new class of capital murder plus discretionary sentencing—on the grounds that it gave "disproportionate significance to the enumeration of aggravating circumstances"¹⁴² has become the constitutionally approved law of the land.

135. *Walton v. Arizona*, 497 U.S. 639, 652-56 (1990) (approving a limiting instruction that allowed the jury to sentence defendant to death if she intended or should have foreseen that her actions would inflict, before death, physical abuse or mental anguish, including the anguish of not knowing one's ultimate fate).

136. The Court has employed a *proportionality* analysis to invalidate death for rape, *Coker v. Georgia*, 433 U.S. 584 (1977), and for a marginal participant in a felony who neither killed, intended to kill, nor anticipated that killing might occur, *Enmund v. Florida*, 458 U.S. 782 (1982). On the other hand, death is proportional in a state scheme rendering death eligible those who are major participants in felonies that result in death and whose participation in the felony manifests a reckless indifference as to death. *Tison v. Arizona*, 481 U.S. 137 (1987). In simple terms, proportionality asks whether the punishment fits the crime, whereas the narrowing inquiry asks whether there is an unacceptable risk that death will be imposed arbitrarily. The difficulty with the Georgia murder statute was that it permitted death to be imposed randomly among those potentially eligible for execution, whereas the difficulty with the Georgia rape statute is that it permitted death to be imposed for criminal behavior that did not warrant that sanction.

137. "Once the sentencer credits the aggravating circumstance, it may choose to impose a death sentence, but it may also choose not to. For constitutional purposes, its decision at this point may be as unguided as under the pre-*Furman* statutes, as the Court has marginally acknowledged." Gillers, *supra* note 68, at 1050.

138. This is the Florida model, which is followed in the large majority of all capital punishment states. Raymond J. Pascucci et al., *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1220-21 n.615 (1984).

139. This is the Georgia model, followed in five states. *Id.* at 1221 n.617.

140. This is the case in Texas and Virginia. *Id.* at 1221-22.

141. *Boyd v. California*, 494 U.S. 370 (1990); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

142. Tent. Draft No. 9, *supra* note 4, at 71-72.

B. Applying Aggravating Circumstances

One way to get a sense of how aggravating circumstances operate is to apply the new law to some representative death cases under the pre-1972 law—the capital murders the Supreme Court considered in *McGautha v. California*,¹⁴³ *Furman v. Georgia*,¹⁴⁴ and *Fisher v. United States*.¹⁴⁵ The *McGautha* court believed that it was beyond the capacity of a legal regime to make meaningful improvements on the system that resulted in death penalties for Dennis C. McGautha and James E. Crampton, whereas a majority of the Court appeared to believe differently about the legal regime that condemned William H. Furman. *Fisher* presents a different type of murder than the three cases already identified and is worth considering for that reason. While the decision did not involve a direct attack on capital punishment, the drafters of the Code pointed to the *Fisher* Court's rejection of the diminished capacity defense as an example of the difficulties with the premeditation formula.¹⁴⁶

In *McGautha*, two men, McGautha and Wilkinson, committed armed robbery in two different stores on the same day. In the second store,

[w]hile one defendant forcibly restrained a customer, the other struck Mrs. Smetana on the head. A shot was fired, fatally wounding Mr. Smetana. Wilkinson's former girl friend testified that shortly after the robbery McGautha told her he had shot a man and showed her an empty cartridge in the cylinder of his gun. Other evidence at the guilt stage was inconclusive on the issue as to who fired the fatal shot. McGautha conceded that he had been convicted of four prior felonies. The California jury found both defendants guilty of two counts of armed robbery and one count of first-degree murder as charged.¹⁴⁷

Crampton was a domestic killer. He murdered his wife with a shot from a .45 caliber revolver while she was using the toilet in her home. They had been married only four months at the time, and he recently had been hospitalized for alcoholism and drug addiction. Crampton had made a number of calls to his wife before the murder, and she had sought and received police protection. He was found guilty under Ohio law for murdering his wife "purposely and with premeditated malice."¹⁴⁸

Furman "killed a householder while seeking to enter the home at night. Furman shot the deceased through a closed door. He was 26 years old and had

143. *McGautha*, 402 U.S. 183 (1971). The opinion discusses two capital murder convictions; it consolidates *McGautha* with *Crampton v. Ohio*.

144. *Furman*, 408 U.S. 238 (1972).

145. *Fisher*, 328 U.S. 463 (1946).

146. Tent. Draft No. 9, *supra* note 4, cmt. 3 at 69. *Fisher* held that a jury need not consider the defendant's mental incapacity short of insanity in determining whether the defendant had the capacity to act, in fact, did premeditate and deliberate. *Fisher*, 328 U.S. at 470. The Code rejected the *Fisher* holding both directly in § 4.02 and through the expansive definition of provocation in § 210.3(1)(b). It also embraced the related doctrine of partial responsibility (impaired capacity permits a finding of life as opposed to death) through its listing of mitigating factors. MODEL PENAL CODE § 210.6(4)(g). The *Fisher* rule is now unconstitutional in death cases. See *Penry v. Lynaugh*, 492 U.S. 302, 322-24 (1989).

147. *McGautha*, 402 U.S. at 187.

148. *Id.* at 191-93.

finished the sixth grade in school."¹⁴⁹ He had ten prior convictions for burglary and had served time in prison.¹⁵⁰ He claimed he had tripped over a wire and the gun went off accidentally, killing the homeowner who had discovered Furman's entry.¹⁵¹

Fisher worked as a janitorial employee in a church library. The victim was the librarian, who had complained of Fisher's work. As the majority opinion related the facts,

The petitioner testified that Miss Reardon [the victim] was killed by him immediately following insulting words from her over his care of the premises. After slapping her impulsively, petitioner ran up a flight of steps to reach an exit on a higher level but turned back down, after seizing a convenient stick of firewood, to stop her screaming. He struck her with the stick and when it broke choked her to silence. He then dragged her to the lavatory and left the body to clean up some spots of blood on the floor outside. While Fisher was doing this cleaning up, the victim "started hollering again." Fisher then took out his knife and stuck her in the throat. She was silent.¹⁵²

Two other facts about Fisher must be related. First, the knife wound apparently was not fatal; it "just went through the skin." Second, according to Fisher the insult from the victim was racial: she called him a "black nigger," something no white person had ever done before.¹⁵³ How would each of these killers fare under the contemporary law of aggravated murder?

149. *Furman v. Georgia*, 408 U.S. 238, 252 (1971) (Douglas, J., concurring). The other two defendants in *Furman* each received their death sentence for the crime of rape. *Id.* at 239.

150. DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY* 85 (1990). Justice White noted in his concurring opinion:

I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty. That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not. The short of it is that the policy of vesting sentencing authority primarily in juries—a decision largely motivated by the desire to mitigate the harshness of the law and to bring community judgment to bear on the sentence as well as guilt or innocence—has so effectively achieved its aim that capital punishment within the confines of the statutes now before us has for all practical purposes run its course.

Furman, 408 U.S. at 313 (White, J., concurring).

According to Baldus, Furman was 18 years old at the time of the shooting. This appears inconsistent with other facts Baldus notes—that he had 10 prior convictions for burglary and had served time in prison—and suggests that the Supreme Court's indication that he was 26 is accurate. Whatever his age, the factors place him in the highest culpability group according to the Baldus study. Nonetheless "convicted murderers whose overall culpability approximated that of Furman received death sentences only one-third of the time. This finding supports Justice White's intuitive judgment that Furman's crime seemed no more serious than hundreds of other cases he had reviewed that had resulted only in prison sentences." BALDUS ET AL., *supra* at 85-86.

151. *Furman v. State*, 167 S.E.2d 628, 629 (Ga. 1969), *rev'd sub nom. Furman*, 408 U.S. 238.

152. *Fisher v. United States*, 328 U.S. 463, 465 (1946).

153. *Id.* at 479 (Frankfurter, J., dissenting).

1. Furman

Furman would be death eligible under the Model Penal Code and under the law of Georgia where the crime occurred. Felony murder makes one guilty of the crime of murder and serves as an aggravated circumstance under both the Model Penal Code and Georgia law. Moreover, neither the Model Penal Code nor Georgia law require that the defendant *intend* to kill.¹⁵⁴ Furman might also be death eligible under the Code due to his history of criminality. This would depend upon whether, in the language of section 210.6(3)(b), he had been convicted of "a felony involving the use or threat of violence to the person." The Georgia Supreme Court held a similar aggravating circumstance unconstitutional on the grounds that it did not adequately control the discretion of the sentencer, and it is no longer part of Georgia law.¹⁵⁵

2. McGautha

McGautha would be death eligible under the Model Penal Code and under the terms of the California statute, which requires traditional murder and a special circumstance (here, felony murder) for a death sentence.¹⁵⁶ Moreover, his four prior felonies could certainly be considered by the jury in determining whether aggravating circumstances outweighed mitigating circumstances, although they alone would not have rendered him death eligible.¹⁵⁷ Had McGautha or Furman committed their crimes in Texas or Louisiana, their death eligibility would turn on whether they *intended* to murder (in Texas) or had the *specific intent* to kill or do serious bodily harm (in Louisiana).¹⁵⁸ At bottom, however, those who kill while committing

154. Rosen, *Felony Murder*, *supra* note 10, at 1103, 1126 n.62 (describing Georgia as a state in which there is no mens rea requirement for felony murder). Because Furman was the actual killer, the literal terms of neither *Enmund v. Florida*, 458 U.S. 782 (1982) (holding that death was not appropriate for non-triggerman who neither killed, attempted to kill, or intended to kill), nor *Tison v. Arizona*, 481 U.S. 137 (1987) (holding that death was appropriate for non-triggerman whose participation in a felony manifested extreme recklessness), apply. Rosen, *Felony Murder*, *supra* note 10, at 1147 n.140.

155. *Arnold v. State*, 224 S.E.2d 386 (Ga. 1976). Now, only a prior capital felony qualifies as an aggravating circumstance in Georgia. GA. CODE ANN. 17-10-30(b)(1).

156. CAL. CODE ANN. §§ 189, 190.2(a)(17) (West 1993). There is some question as to what state of mind, if any, McGautha needed with respect to the special circumstance of felony murder. In *People v. Green*, 609 P.2d 468 (Cal. 1980), the California Supreme Court ruled that the killing had to be done with the intent of furthering the felony. However, in *People v. Kimble*, 749 P.2d 803 (Cal. 1988), *modified*, slip op. (Cal. 1988), the court appeared to back away from the requirement of an independent mens rea for a special circumstance. John W. Poulos, *The Lucas Court and Capital Punishment: The Original Understanding of the Special Circumstances*, 30 SANTA CLARA L. REV. 333, 413-20 (1990).

157. The California Code identifies the special circumstances that must exist for a defendant to be death eligible. Section 190.2(a)(2) treats a prior record for murder as a special circumstance. Once the defendant is death eligible, section 190.3(c) treats the presence or absence of any prior felony conviction as a factor to be weighed in determining whether the defendant is sentenced to death. CAL. PENAL CODE §§ 190.2-.3 (West 1988).

158. TEX. CODE ANN. § 19.03(a)(2) (West 1993); LA. REV. STAT. ANN. § 14:30A (West 1993). Five other states impose an intent to kill requirement at the guilt determination stage—Alabama, Ohio, Oregon, Utah, and Virginia. In addition, five other states—Idaho, Indiana, Mississippi, Nevada, and New Mexico—put an intent to kill requirement into the aggravating circumstance itself. Finally, two states—Missouri and Pennsylvania—reject felony murder as the basis for determining guilt of capital

felonies—the McGauthas and Furmans of the world—are death eligible in virtually any state in this country that embraces capital punishment.

3. Crampton

Crampton would be guilty of aggravated murder under Ohio law because he “purposely, and with prior calculation and design” killed his wife.¹⁵⁹ He would not be eligible for the death penalty, however, because his crime did not involve any of the aggravating circumstances necessary to justify a death penalty under Ohio law.¹⁶⁰ Specifically, Ohio does not consider “heinousness” as an aggravating circumstance.

Whether Crampton would be death eligible under the Model Penal Code turns upon how expansively a court interprets section 210.6.3(h): “The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity.” The commentary to the Code suggests that this provision is concerned with the “style of killing.”¹⁶¹ If so, Crampton escapes death eligibility because he killed efficiently.

The Court has not required the twenty-three states¹⁶² that employ this aggravating circumstance to adhere to the Code interpretation that it refers solely to the style of the actual killing.¹⁶³ Thus, one might point to Crampton’s repeated calls to his wife and his string of threats as indicative of a desire to make her suffer psychologically before he actually killed her. However, even in the states that consider psychic suffering before death to be indicative of exceptional depravity, no case seems to go so far as to treat

murder but employ an aggravating circumstance that the killing be committed during the perpetration of the felony. Rosen, *Felony Murder*, *supra* note 10, at 1130 nn.68 & 69.

159. OHIO REV. CODE ANN. § 2903.01(A) (Anderson 1993).

160. The Ohio Code provides that the death penalty is “precluded” unless one or more of eight aggravating circumstances is present. These circumstances include assassination of particular government officials, murder for hire, murder to escape the processes of the law, murder by a prisoner, murder by a convicted killer, murder of a peace officer, murder during certain felonies, and murder of a witness. OHIO REV. CODE ANN. §§ 2929.04(A)(1)-(A)(8). None of the circumstances cover the deliberate killing of one’s spouse.

161. MODEL PENAL CODE cmt. 6(a).

162. Rosen, *The Standardless Standard*, *supra* note 10, at 943, lists 24 such states but includes California whose Supreme Court rejected the circumstance as unconstitutionally vague. *People v. Superior Court*, 647 P.2d 76, 81 (Cal. 1982).

163. *Walton v. Arizona*, 497 U.S. 639, 654-55 (1990), upheld an interpretation that includes mental as well as physical suffering by the victim before death, including the victim’s uncertainty as to her fate. Additionally, *State v. Brewer*, 826 P.2d 783, 798 (Ariz. 1992), *cert. denied*, 113 S. Ct. 206 (1992), reaffirms the view that cruelty can include mental as well as physical suffering.

Crampton's action as meeting the test.¹⁶⁴ Because he killed with a single shot, Crampton cannot be executed.

4. Fisher

Fisher presents the test case for the narrowing function of the new law. The bare facts of this case—an African American male inefficiently killing a white woman whom he encountered in her official capacity—suggest that prosecutors would seek the death penalty and juries would probably award it. However, as long as Fisher did not take anything from Ms. Reardon after killing her, in the fourteen states that do not embrace “heinousness” killing, Fisher could not receive the death sentence. Of course, if Fisher did take something after the attack so that the killing could be considered to have been committed during the course of a felony such as robbery, then he would probably be death eligible everywhere.¹⁶⁵

What of the states which embrace the heinousness aggravating circumstance? Because the killing took place over a period of time and involved a blow with a blunt object, strangulation, and the use of a knife, the killing would probably fall within most definitions of heinousness.¹⁶⁶ The victim's remaining alive and apparently conscious while Fisher attempted to clean up

164. Indeed, the few cases on the subject go in the opposite direction. In *State v. Stanley*, 312 S.E.2d 393, 398 (N.C. 1984), the North Carolina Supreme Court found no psychological torture when the defendant drove back and forth in front of his house, his wife cried “Please Stan,” and then he shot her nine times in rapid succession. Even more dramatically, the Florida Supreme Court ruled that an aggravating circumstance calling for “heightened premeditation” (“committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification,” FLA. STAT. ANN. § 921.141 (5)(i)) was not supported by evidence of a calculated domestic murder because “[t]here was no deliberate plan formed through calm and cool reflection, . . . only mad acts prompted by wild emotion.” *Santos v. State*, 591 So. 2d 160, 163 (Fla. 1991).

With respect to the heinousness provision, Crampton's killing falls within the small group of cases that are exempted from its reach in a state like Florida. “The survey [of Florida cases] demonstrates that virtually all reported Florida death cases have been found especially heinous, atrocious or cruel *except* those resulting in instantaneous, unexpected, death not committed ‘execution style.’” Mello, *supra* note 91, at 533 (emphasis in original).

165. *Singleton v. State*, 465 So. 2d 432 (Ala. Ct. App. 1983) is a case which shares much in common with *Fisher*. Singleton killed a nun whom he encountered in a graveyard after asking her to pray for him. His confession revealed Singleton to be a person of limited intelligence, and his manner of killing suggested that he, like Fisher, did not intend to kill as much as he intended to make his victim be quiet. Following the killing, however, Singleton took the victim's watch. This fact permitted the state to charge him with felony murder, and thus convict him of capital murder. ALA. CODE § 13A-5-40(a)(2). At this point, the jury must find an aggravating circumstance, one of which is the “heinousness” of the killing. *Id.* § 13A-5-49(8). Singleton was executed on November 20, 1992. Colman McCarthy, *Barbaric Government Killing*, WASH. POST, Dec. 5, 1992, at A23.

In California there is precedent for the proposition that the killing must occur to advance an underlying crime, such as robbery, for the defendant to be eligible for the death penalty. *People v. Green*, 609 P.2d 468, 504-06 (Cal. 1980), *cert. denied*, slip op. (U.S. 1993). Under this interpretation, Singleton might have been spared. However, more recent decisions cast doubt on the *Green* holding. *People v. Kimble*, 749 P.2d 803, 816 (Cal. 1988), *cert. denied*, 488 U.S. 871 (1988), and *cert. denied*, 494 U.S. 1038 (1990). For a discussion of these developments, see Poulos, *supra* note 156, at 413-20.

166. Rosen, *The Standardless Standard*, *supra* note 10, at 965-88.

the library would support such a finding.¹⁶⁷ Although courts may speak as though heinousness was reserved for instances of "extreme and outrageous depravity exemplified either by the desire to inflict a high degree of pain or an utter indifference to or enjoyment of the suffering of another,"¹⁶⁸ their practice is to uphold a finding of the aggravating circumstance when the victim consciously suffers during the attack.¹⁶⁹ Clumsy killers are heinous killers.¹⁷⁰

But what of Fisher's lack of desire or purpose to make Reardon suffer? As Justice Frankfurter noted in his powerful dissent, it is difficult to read the record without concluding that Fisher's only conscious desire was to stop Ms. Reardon from screaming.¹⁷¹ While the defendant's state of mind is relevant to a finding of heinousness, few states make a purpose to cause suffering a prerequisite to such a finding. Thus, Arizona courts recognize "apparent relishing of the murder" as one of five factors that go into a determination of heinousness,¹⁷² but it appears to be sufficient if the defendant was negligent with respect to whether the victim would suffer.¹⁷³ Florida also contradicts itself on this point.¹⁷⁴ While language in decisions in other states points to some mens rea element, it does not get much emphasis.¹⁷⁵

In general, heinousness can be found in what the defendant did without great concern for whether it was his actual purpose to cause extraordinary suffering.¹⁷⁶ These results have some odd features. Of the four killers, only

167. As to the importance of the victim's remaining conscious, see, for example, *State v. Lavers*, 814 P.2d 333 (Ariz. 1991), *cert. denied*, 112 S. Ct. 343 (1991); *Ponticelli v. State*, 593 So. 2d 483 (Fla. 1991), *vacated*, 113 S. Ct. 32 (1992) (judgment vacated in light of *Espinosa v. Florida*, 112 S. Ct. 2926 (1992)); *Taylor v. State*, 404 S.E.2d 255 (Ga. 1991), *cert. denied*, 112 S. Ct. 393 (1991); *State v. Artis*, 384 S.E.2d 470 (N.C. 1989), *vacated on other grounds*, 494 U.S. 1023 (1990); and *Fox v. State*, 779 P.2d 562, 576 (Okla. Crim. App. 1989), *cert. denied*, 494 U.S. 1060 (1990).

168. *Wickham v. State*, 593 So. 2d 191, 193 (Fla. 1991), *cert. denied*, 112 S. Ct. 3003 (1992).

169. Mello, *supra* note 91, at 551.

170. New Jersey is an exception. *Ramseur v. State*, 524 A.2d 188, 229 (N.J. 1987), *cert. denied*, 113 S. Ct. 2433 (1993).

171. *Fisher v. United States*, 328 U.S. 463, 479 (1946) (Frankfurter, J., dissenting).

172. *State v. Brewer*, 826 P.2d 783, 799 (Ariz. 1992), *cert. denied*, 113 S. Ct. 206 (1992).

173. *State v. Greenway*, 823 P.2d 22, 33 (Ariz. 1991).

174. Compare *Wickham v. State*, 593 So. 2d 191, 193 (Fla. 1991), *cert. denied*, 112 S. Ct. 3003 (1992), with *Hitchcock v. State*, 578 So. 2d 685, 692 (Fla. 1990), *cert. denied*, 112 S. Ct. 311 (1991), and *vacated*, 112 S. Ct. 3020 (1992) (judgment vacated in light of *Espinosa v. Florida*, 112 S. Ct. 2926 (1992)).

175. Rosen concludes that as of 1986 "the only thing that the cases have in common is that the reviewing courts have been able to find *something* disturbing in each case." Rosen, *The Standardless Standard*, *supra* note 10, at 989 (emphasis in original). *Maynard v. Cartwright*, 486 U.S. 356 (1988), which reaffirmed *Godfrey v. Georgia*, 446 U.S. 420 (1980), suggests that the Supreme Court continues to be concerned about the lack of precision in state court approaches to the "heinousness" circumstance. While the Court insists upon a limiting construction, it has not required that the circumstance be limited to torture or serious physical abuse. *Maynard*, 486 U.S. at 365. The Court has never addressed the issue of whether any mens rea is required for this or any other aggravating circumstance.

176. When it comes to an aggravating circumstance limited to torture, however, at least two states—California and Pennsylvania—affirmatively insist on proof that the defendant actually intended to inflict pain beyond that inherent in the act of killing. *People v. Raley*, 830 P.2d 712, 729 (Cal. 1992), *cert. denied*, 133 S. Ct. 1352 (1993) (holding that the killing must be committed "with a wilful, deliberate, premeditated intent to inflict extreme and prolonged pain upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose," (quoting CALIFORNIA JURY INST.

one—Crampton—planned to kill. He alone expended considerable effort locating the victim in order to kill. He is the only one about whose purpose to kill there can be no doubt. Yet he is the only one who is not death eligible under the terms of the Code or, for that matter, in the overwhelming majority of capital states.¹⁷⁷ He alone cannot be cowed by a prosecutor's threat to seek the death penalty because he alone knows that his crime does not make him death eligible. He is the beneficiary of the narrowing of capital punishment. If there is a principle of moral equivalency operating here, it is one that treats defendants who did not plan to kill as more depraved than those who did.

Crampton differed from the other killers because he alone killed an intimate. McGautha and Furman apparently did not know their victims, whereas Fisher's contact with his victims grew out of a working relationship, not a social or intimate one.¹⁷⁸ That Crampton is exempted from death while the others remain eligible is not fortuitous. The result flows from the decision to adopt the felony-murder model for aggravating circumstances. The paradigmatic victim of a felony murder is a stranger; the rational felon victimizes people who do not know him or her. The paradigmatic victim of a truly premeditated killing is someone whom the killer knows and thinks about, such as a wife, husband, or lover. While this difference received no explicit attention in the Code's commentary, the stark difference between the law's response to killing strangers as opposed to intimates has become a hallmark of the new law of murder.¹⁷⁹

Crampton, McGautha, and Furman all used guns, but this does not enhance their chance of being executed. Indeed, it is precisely because Fisher did not use a gun that his "style of killing" would render him death eligible today. Similarly, it was Crampton's efficient use of a gun that immunizes him from death. This is a somewhat strange result, given the practice of increasing a sentence if someone uses a gun in the commission of a crime.¹⁸⁰ McGautha and Furman each had a felony history but, in the states in which they committed their crimes, this fact alone would not make them death eligible.

CRIMINAL § 8.24 (Arnold Levin ed., 1988) (emphasis in original); *Commonwealth v. Chester*, 587 A.2d 1367, 1381 (Pa. 1991), *cert. denied*, 112 S. Ct. 152 (1991), and *cert. denied*, 112 S. Ct. 422 (1991) (the state "must prove that the defendant intended to inflict a considerable amount of pain and suffering on the victim Implicit in the definition of torture is the concept that the pain and suffering imposed on the victim was unnecessary, or more than needed to effectuate the demise of the victim." (footnote omitted)).

177. If a state employed a "cold and calculating" aggravating circumstance and, unlike the Florida Supreme Court in *Santos v. State*, 591 So. 2d 160 (Fla. 1991), interpreted it in a way which embraced domestic killings, Crampton's crime might render him death eligible.

178. Barnett's analysis of Georgia data suggests that, in the eyes of a sentencing jury, a work or professional relationship resembles that of a stranger relationship. These are the cases in which juries are most likely to impose death. Arnold Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327, 1340-41 (1985).

179. Rapaport, *supra* note 10.

180. *McMillan v. Pennsylvania*, 477 U.S. 79 (1936), represents an effort to achieve this result through the use of sentencing factors. The more typical approach is to create a different crime with a higher penalty for certain felonies committed while armed.

Finally, in 1972 the Supreme Court saw nothing unusual about Furman's case: nothing, that is, which justified putting him to death while numerous murderers like him received life. This is still true except that now society can put Furman to death with a constitutionally clean conscience. Although neither before 1972 nor today do more than three out of ten murderers like Furman receive death,¹⁸¹ what was once arbitrary and capricious has now become regular and rational. What society has gained or lost through this process remains to be explored in Part III.

III. THE NEW LAW EVALUATED

The new law of murder has not delivered on its explicit promise of eliminating arbitrariness in the imposition of death,¹⁸² nor on its implicit commitment to drive racial considerations from the death sentencing process.¹⁸³ This result is not surprising—there was and is no basis for believing that substituting aggravating circumstances for premeditation and deliberation could tame the forces which produce unevenness and inequality.¹⁸⁴ While *Coker v. Georgia*¹⁸⁵ eliminated the most egregious instance of defendant-based discrimination, *Gregg v. Georgia* and *Zant v. Stephens* have validated the narrowing of the number of death eligible in a manner that can, and frequently does, heighten the role that the race of the victim plays in death decisions. The existence of statutorily defined aggravating circumstances has also facilitated the process that drives the criminal justice system—plea bargaining.

Precisely because they are specific, factual, and ascertainable at the time of indictment, aggravating circumstances play a central role in the processing of homicide cases. They influence charging and plea bargaining decisions. Because most murders, like most other crimes, are adjudicated by negotiation and plea rather than by trial, few issues assume greater importance than whether the case is potentially capital or not. Whatever might be said for the prospect of death as a deterrent to crime, there can be little question that the prospect of a death sentence exerts a powerful influence once the defendant has been apprehended and must decide how to plead.¹⁸⁶ Death can be the

181. BALDUS ET AL., *supra* note 150, at 84-85.

182. BARRY NAKELL & KENNETH A. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY 151-61 (1987); Jonathon R. Sorenson & James W. Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 743, 775-76 (1991).

183. Sorenson & Marquart, *supra* note 182, at 751-57 (reviewing findings of empirical studies on this issue).

184. This is particularly true given that there is no control over the discretion of the sentencer once a statutory aggravating circumstance is present. See Ledewitz, *supra* note 10, at 348.

185. *Coker*, 433 U.S. 584 (1977) (holding that death is an unconstitutionally disproportionate sentence for the crime of rape).

186. "I begin with the premise that, in the vast majority of cases, *success* in a capital case means having the client sent to prison for life." William S. Geimer, *Law and Reality in the Capital Penalty Trial*, 18 N.Y.U. REV. L. & SOC. CHANGE 273, 278-79 (1990-91) (emphasis added).

price for a refusal to plead or otherwise cooperate.¹⁸⁷ "Indeed, an examination of the system as it actually operates suggests that in fact the most important function of the death penalty may be to facilitate prosecutors' efforts to induce guilty pleas."¹⁸⁸

This is not news. The same situation existed before *Furman*.¹⁸⁹ The difference today is that aggravating circumstances create the appearance (and, to varying degrees, the reality) of precisely delineating the conditions under which a case can be capital. While this means that a certain percentage of all murderers cannot be death eligible (and therefore cannot be bluffed into worrying about a death sentence), it might have the opposite effect with those whose crimes clearly fall within the death eligible category.

For the group whom the statute has identified in advance, it is no longer just a matter of the prosecutor's discretionary decision. Rather, the law itself indicates that these are the criminals who should face the possibility of execution.¹⁹⁰ This strengthens the prosecutor's bargaining position while also permitting her to distance herself from responsibility for the decision to seek death. Indeed, the entire superstructure of contemporary death penalty arrangements, with its promise of seemingly endless appeals and review, may provide moral comfort to one determining whether to seek the death penalty.¹⁹¹ Thus, the prosecutor's bargaining position depends on whether the circumstances surrounding the killer, the killing, and the victim can support a finding of capital murder. If yes, the prosecutor has a very strong position indeed. Even if, as in Georgia, the odds that a jury will agree with the prosecutor seeking capital punishment are only a little better than

187. This occurred in *Tison v. Arizona*, 481 U.S. 137 (1987). The younger Tisons refused to plead and cooperate with the prosecutor and, as a result, they received death sentences.

188. WELSH S. WHITE, *THE DEATH PENALTY IN THE EIGHTIES* 46-47 (1987).

189. The Royal Commission Report on Capital Punishment describes plea bargaining over capital indictments as a central feature of the American experience. "In substance, as some witnesses frankly stated, an indictment for murder in the first degree is a bargaining weapon which is employed freely and with great effect." ROYAL COMM'N, *supra* note 1, at 188.

190. Baldus and his associates speculate that the institution of aggravating circumstances "might also have invited juries to impose death sentences more frequently in those cases in which they learned that, on the basis of legislatively enacted criteria, the defendants were death eligible. The higher death-sentencing rates in the post-*Furman* period tend to support this hypothesis." BALDUS ET AL., *supra* note 150, at 103 (footnote omitted). The circumstances of a contemporaneous felony and a particularly vile murder were particularly influential as they were transformed, post-*Furman*, into statutory aggravating circumstances. These features were present either separately or together in 57% of all murders before *Furman* and 68% after 1973. However, among those actually sentenced to death, a contemporaneous felony was present in 54% of all cases before *Furman* as contrasted to 88% in the cases after 1973; for a vile killing, the figures went from 50% before *Furman* to 83% after *Furman*. *Id.* at 104.

191. Referring to the sentencing decision itself, Weisberg makes the following observation:

In the case of the death penalty, the law has sometimes offered the sentencer the illusion of a legal rule, so that no actor at any point in the penalty procedure need feel that he has chosen to kill any individual. But our ambivalence has simply manifested itself in the clumsy administrative and legal complexities with which we have undone the innumerable death sentences which we have generated.

Weisberg, *supra* note 130, at 393.

50-50,¹⁹² the stakes are as high as the law permits. And the prosecutor can bet these stakes in a large number of cases.

A. Narrowing in Pursuit of Consistency

Some gross statistics help demonstrate the reach of the Model Penal Code's aggravating circumstances. Nearly a quarter (23%) of all prisoners convicted of murder and non-negligent homicide have a prior violent felony conviction (and more than half have a felony conviction of some kind),¹⁹³ and approximately 20% of all murders and non-negligent homicides involve a felony circumstance.¹⁹⁴ While there are no national statistics concerning the percentage of killings that qualify as heinous,¹⁹⁵ in 1991 approximately 34% of all murders and non-negligent homicides involved a weapon other than a gun and nearly 18% of all murders and non-negligent homicides involve use of something other than a gun or knife.¹⁹⁶ Killings committed without a gun are most likely to be slow and inefficient and thus most likely to be viewed as heinous.¹⁹⁷ For 1991, 16% of victims were family members, intimates, or acquaintances of the assailant, 47% were family members or acquaintances, and 15% were strangers (the category of victims most likely to result in death sentences).¹⁹⁸

It is not possible to make even a rough approximation from national statistics of how many killings create a risk to a great many people, or how many involve pecuniary gain.¹⁹⁹ These various categories overlap, and the

192. This is the finding of the Barnett study for Georgia. Barnett, *supra* note 178, at 1352. Texas is different. In Texas, juries gave the death penalty to 77% of defendants convicted of capital murder between 1974 and 1988. Sorenson & Marquart, *supra* note 182, at 769.

193. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL STATISTICS, 1990, tbl. 6.66 at 615. The data discussed in the text are for 1986.

194. The Supplementary Homicide Reports (1976-1989) place the figure at 18% over a 13-year period. UNIFORM CRIME REPORTS, SUPPLEMENTARY HOMICIDE REPORTS (1976-1989) [hereinafter SHR]. These reports are compiled by the FBI's Uniform Crime Reporting Section ("UCR") from information collected from local law enforcement agencies. Dean James Fox of the Northeastern University College of Criminal Justice and director of the National Crime Analysis Program at Northeastern provided the data for Supplemental Homicide Reports (1976-1989). Other investigators estimate that 22% of killings fall into this category. Glenn L. Pierce & Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. REV. L. & SOC. CHANGE 711, 713 (1990-1991).

195. In a study of all homicides in Philadelphia between 1948 and 1952, the investigator found that the homicides were almost evenly divided between non-violent (a single blow or shot) and violent (more than one blow, shot, or stab). WOLFGANG, *supra* note 47, at 156-64. While not all multiple-act homicides would qualify as heinous, the data at least suggest that such killings are not infrequent.

196. BUREAU OF JUSTICE STATISTICS, *supra* note 6, tbl. 3.134 at 382.

197. In Georgia and Florida, which have broad heinousness standards, killings involving weapons other than guns were between 1.7 and 1.95 times more likely to result in a death sentence than killings with guns. In Illinois, which restricts heinousness to victims under 12, there was no difference in the death sentence rate in terms of whether the killing was with a gun or with another weapon. SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION* tbl. 4.13 at 52 (1989).

198. BUREAU OF JUSTICE STATISTICS, *supra* note 6, tbl. 3.139 at 386. Because some 38% of the reported cases classify the relationship between victim and assailant as "unknown," it is a fair estimate that the actual percentage of killings involving strangers is higher than the 15% reported in the text.

199. Some empirical studies of individual states demonstrate the difficulty of making exact estimates with respect to these matters. These results also demonstrate the wide differences that flow from judicial treatment of certain aggravating circumstances.

national figures lump manslaughter with murder. But at an absolute minimum, one can see that the Code's menu of aggravating circumstances applies to a significant percentage of non-negligent, criminal homicides.

For states that employ a more narrow set of aggravating circumstances than the Code, about one in five persons convicted of a non-negligent homicide is death eligible, and about two in five convicted of *murder* are death eligible.²⁰⁰ Thus, in these states, some 60% of those who would have been eligible for the death penalty before *Furman* are no longer in that category because a required aggravating circumstance is not present. At the other extreme, in states with expansive death penalty statutes modeled on the Model Penal Code, there may be little narrowing. In the most comprehensive published study of the operation of the new law in a given state, Baldus and his co-investigators estimate that for the period between 1974 and 1979, 86% of the 767 people convicted of murder in Georgia were death eligible under that state's broad death penalty statute.²⁰¹

Murders involving a contemporaneous felony and murders involving "heinousness" are the two most frequently charged aggravated murders. Thus in New Jersey, out of 246 death eligible cases between 1983 and 1991, 157 involved a felony circumstance and 81 involved vile and heinous behavior. Of those sentenced to death, more than half involved a finding of heinousness, or felony circumstance, or both.²⁰² In Georgia, more than half of all murders

Baldus and his associates found that out of 606 death eligible cases, 96 or 16% provided a basis for the "endangering others" circumstance, and 212 or 35% provided a basis for Georgia's broad pecuniary motive circumstance. BALDUS ET AL., *supra* note 150, at 89. In New Jersey, 17% of the death eligible cases involved the "grave risk" circumstance but only 2% involved the narrowly defined pecuniary circumstance factor. DAVID C. BALDUS, DEATH PENALTY PROPORTIONALITY REVIEW PROJECT, FINAL REPORT FOR THE NEW JERSEY SUPREME COURT tpls. 1 & 10 (1991) [hereinafter BALDUS, PROPORTIONALITY REVIEW].

Paternoster, reviewing South Carolina homicides from 1977 to 1981, identified 311 death-eligible cases. Of these, less than 2% (5) involved murder for pecuniary gain and none involved a "grave risk" to two or more persons in public. Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Discrimination*, 18 LAW & SOC'Y REV. 437, 446 (1984). In Pennsylvania, a study of 1174 first-degree murder convictions from 1978 through 1989 revealed that prosecutors alleged the existence of an aggravating circumstance in 856 cases. Of these, 150 (13% of all cases) involved the circumstance of knowingly creating a grave risk to a person other than the victim and 53 (4.5% of all cases) involved either paying another to kill or receiving pay to kill. John F. Karns & Lee S. Weinberg, *The Death Sentence in Pennsylvania 1978-1990*, DICK. L. REV. 691, 719 (1991).

200. Raymond Paternoster, *Race of Victim and Location of Crime*, 74 J. CRIM. L. & CRIMINOLOGY 754, 765 (1983). Paternoster concluded that 321 out of 1686 individuals charged with non-negligent homicides committed in South Carolina from June 1977 through the end of December 1981, or 19%, were death eligible under South Carolina's narrowly drawn death statute. *Id.*

Pierce and Radelet, using FBI data, approximate that about 22% of all non-negligent homicides are death eligible. They arrive at this figure by assuming that the homicides that have an accompanying felony are death eligible and that the others are not. Pierce and Radelet, *supra* note 194, at 713.

Baldus and his associates found a felony circumstance in 20% of voluntary manslaughter and murder convictions; considering murder convictions alone, the figure is 38%. BALDUS ET AL., *supra* note 150, at 269 n.31. The investigators used these figures to estimate the rough percentages of death eligibility in states with relatively narrowly drawn capital statutes.

201. Georgia's definition of murder has remained unchanged since before *Furman*. GA. CODE ANN. § 16-5-1 (1968). Georgia uses 10 aggravating circumstances, including "outrageously or wantonly vile." *Id.* § 17-10-30(b)(7) (1973).

202. BALDUS ET AL., *supra* note 150, tpls. 1 & 10 at 51, 92.

involved the vileness circumstance and nearly half involved a contemporary felony; more than 80% of all those sentenced to death had killed under one or both of these aggravating circumstances.²⁰³ In Florida, Illinois, Mississippi, and Virginia, more than 70% of all death penalty cases involved a contemporary felony as did two of out of three such cases in Arkansas and North Carolina and more than one half of the cases in Oklahoma.²⁰⁴ In Pennsylvania, between 1978 and 1989, an accompanying felony circumstance was alleged in 103 of 214 cases resulting in a death sentence.²⁰⁵

Baldus concluded that "statutorily designated aggravated circumstances in Georgia's post-*Furman* law do not serve in practice to distinguish murder cases in which death sentences are routinely imposed from those that normally result in a life sentence."²⁰⁶ Moreover, the existence of an individual aggravating circumstance appears to contribute nothing to an increase in consistency after *Furman*.²⁰⁷ More than 90% of those who received death before *Furman* would have been eligible to receive death after *Furman*.²⁰⁸ On the other hand, there was an increase in the rate at which death sentences were imposed. Fifteen percent of murderers received death before *Furman*, and 19% of murderers received death after *Furman*. Twenty-three percent of all death-eligible murderers received death after *Furman*.²⁰⁹

When one begins to aggregate aggravated circumstances, however, their power to predict death sentences increases.²¹⁰ Moreover, when one goes

203. *Id.* at 89.

204. GROSS & MAURO, *supra* note 197, at 45, 89.

205. Karns & Weinberg, *supra* note 199, tbl. 13 at 699, 719. The juries actually found the circumstance in only 82 of these cases; in the other 21, the juries found some other aggravating circumstance that enabled them to impose a death sentence. Pennsylvania requires a finding that the defendant intended to kill in order to support a felony murder aggravating circumstance.

206. BALDUS ET AL., *supra* note 150, at 97.

207. The authors of EQUAL JUSTICE AND THE DEATH PENALTY note:

Thus, if cases were matched only by statutory aggravating factors, the post-*Furman* system would appear to be at least as random as the pre-*Furman* system viewed most favorably More than half (.57) of the death sentences imposed under the revised procedures were presumptively excessive, compared to .43 for the pre-*Furman* period. Perhaps even more significantly, there would be no subcategory of cases, defined by a specific statutory aggravating circumstance, for which the death-sentencing rate equalled our benchmark for evenhandedness, a rate of .80.

Id. at 90.

The picture is not quite this bleak. When one begins to cumulate aggravating circumstances, the death sentencing rate goes up proportionately from a rate of .04 when there is a single aggravating factor to .63 when there are five or six aggravating factors. Moreover, consistency improves again if one abandons statutory aggravating circumstances and considers 17 legitimate case characteristics which make up the author's culpability index. *Id.* at 90-91. For a further discussion of consistency, see *infra* note 213.

208. BALDUS ET AL., *supra* note 150, at 102.

209. *Id.* at 268 n.31. Of the 4472 Georgia murders and non-negligent manslaughters reported to the FBI between 1974 and 1979, 17% resulted in murder convictions. Of these 17%, 86% were eligible for death under the Georgia statute. Forty-five percent of both the reported murders and voluntary manslaughters resulted in convictions, and of these, 65% were death eligible under post-*Furman* Georgia law. *Id.*

210. BALDUS ET AL., *supra* note 150 at 89; GROSS & MAURO, *supra* note 197, tbs. 4.22 & 5.2 at 60, 90 (demonstrating this relationship in Florida, Georgia, Illinois, Oklahoma, North Carolina, Mississippi, and Arkansas); Karns & Weinberg, *supra* note 197, at 721.

beyond the lawfully designated aggravating circumstances and considers legitimate,²¹¹ extra-legal factors, the level of consistency increases even more significantly.²¹² Thus, the most comprehensive before and after study of the impact of the new law concluded that, when one combined statutory and non-statutory legitimate factors, the consistency with which death was imposed did increase after *Furman*.²¹³

When one looks beyond the listed aggravating circumstances, a sentencer's confidence that the defendant deliberately chose to take a life plays an important role in terms of the ultimate disposition of the case. However logical the intellectual argument against premeditation and deliberation, those who actually make the decisions about life or death care a good deal about the principle that conscious and deliberate killings are the most blameworthy.²¹⁴ Who the victim is, whether a prior relationship existed with the killer, and

Nakell and Hardy examined some 600 homicides resulting in arrests in North Carolina for the period June 1, 1977, through May 31, 1978. Out of these cases, eight individuals were sentenced to death, with one individual receiving two death sentences. Nakell and Hardy created a weighted scale for aggravating circumstances. NAKELL & HARDY, *supra* note 182, at 107. Using this variable, they found the level of aggravating circumstances to be statistically significant at the indictment stage and at the stage of deciding whether to put the individual on trial for first-degree murder. But it was not significant at the stages when the case was submitted to the jury, when the jury convicted the defendant, or when the jury returned a death sentence. *Id.* at 120-49.

211. As opposed to such illegal and therefore illegitimate factors as race of the defendant or race of the victim.

212. For instance, Barnett identifies three factors which, when present together, produce a death sentence in 81% of the cases: (1) the certainty that the defendant is a deliberate killer; (2) the status of the victim (for example, the victim is a total stranger or acting in her official capacity when slain); and (3) the "heinousness" of the killing. Barnett, *supra* note 178, at 1339-45. The next category down in terms of the overall score on these variables led to death sentences in about 25% of the cases. This prompted Barnett to suggest:

Suppose, for argument's sake, that all Category 3 death sentences in Georgia were vacated. If our classification scheme makes sense, this act *alone* might greatly reduce the arbitrary element in the Georgia death sentencing. . . . Yet, Georgia would still have . . . something like eight executions per year. Georgia might be able to satisfy the requirements for proportionality review, therefore, without coming anywhere close to abolishing capital punishment.

Id. at 1353 (emphasis in original).

213. BALDUS ET AL., *supra* note 150, at 97. Consistency is measured in two ways. First, the authors describe the cases in which life is normally the result and then look to see the extent to which the cases in which death is imposed overlap with these cases. This measures the extent to which death cases are in fact distinguishable from life cases. By this measure, some 61% of pre-*Furman* death cases overlapped with the normal range of life cases as contrasted to 29% post-*Furman*. *Id.* figs. 4 & 5 at 83, 91. Moreover, when one divides cases according to those in which death is imposed in fewer than 35 out of 100 instances and those in which death is imposed in 80 out of 100 instances, a considerably higher percentage of post-*Furman* cases were in the group in which death is consistently imposed. *Id.* tbs. 5 & 10 at 85, 92. As noted, if one simply employed the statutory aggravating circumstances to measure post-*Furman* consistency, then there is a *decrease* in consistency between the pre-1972 and post-1972 cases. *Id.* tbs. 5 & 9 at 85, 90.

214. BALDUS, PROPORTIONALITY REVIEW, *supra* note 199, at 72; NAKELL & HARDY, *supra* note 182, at 147 (stating that the degree of culpability of first-degree murder is one of two—prior record being the other—statistically significant factors in explaining the probability of a death sentence as the pool is reduced from homicide arrests representing 489 defendant-victim units to eight death sentences); Barnett, *supra* note 178, at 1339-40. For experimental evidence confirming that deliberate killers are seen as more blameworthy than other participants in a felony murder, see Norman J. Finkel, *Capital Felony-Murder, Objective Indicia, and Community Sentiment*, 32 ARIZ. L. REV. 819, 848 (1990).

whether the victim is a woman or a child are also relevant factors.²¹⁵ Where the crime occurs also matters; even within states, substantial disparities exist in terms of the rate at which murders are prosecuted as capital and in the resulting rate of death sentences.²¹⁶

While there may be an increase in the consistency with which death is imposed in cases involving a particular constellation of circumstances, this increase cannot be attributed to the existence of a new class of capital murder. Simply put, no evidence shows that the existence of a single aggravating circumstance guarantees that death will be applied more consistently than it was applied in murder convictions before 1972. Because a cumulation of aggravating circumstances helps predict which cases will end in death sentences, it appears that if aggravating circumstances play a role, it is as a guide to the exercise of discretion. However, no state has embraced the logic of these findings by requiring more than a single aggravating circumstance as a condition of death eligibility or by amending its capital sentencing statute to recognize the powerful effects the status of the victim and the deliberateness of the defendant's act have on sentencers.²¹⁷

215. Samuel Gross and Robert Mauro have found that stranger killings result in a death sentence at a considerably higher rate than non-stranger killings in every state they studied: Georgia, Florida, Illinois, Oklahoma, North Carolina, Mississippi, Virginia, and Arkansas. GROSS & MAURO, *supra* note 197, at 48, 235-45. They also report this same relationship when the victim is a woman. *Id.* at 52, 235-45. Baldus and associates, in constructing their culpability scale for Georgia, identified 18 relevant factors, six of which dealt with victim status: stranger, female, hostage, police or firefighter, child younger than 12, and low status. Of these, only one—police and fire status—is a statutory aggravating circumstance. David C. Baldus et al., *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1375, 1396 (1985); Barnett, *supra* note 178, at 1338-45 (discussing the importance of the lack of prior social relationship between victim and defendant).

216. BALDUS ET AL., *supra* note 150, at 244-46.

217. Justice Stevens argued for this kind of approach in his dissent in *McCleskey v. Kemp*, 481 U.S. 279 (1987), a case in which the Court upheld the constitutionality of the Georgia death penalty scheme even assuming that it had been demonstrated statistically that the race of the victim played a key role in the imposition of death:

The Court's decision appears to be based on a fear that the acceptance of *McCleskey's* claim would sound the death knell for capital punishment in Georgia. If society were indeed forced to choose between a racially discriminatory death penalty (one that provides heightened protection against murder "for whites only") and no death penalty at all, the choice mandated by the Constitution would be plain. [*Eddings v. Oklahoma*, 455 U.S. 104 (1982)]. But the Court's fear is unfounded. *One of the lessons of the Baldus study is that there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.*

Id. at 367 (Stevens, J., dissenting) (emphasis added). Justice Stevens was referring to statistics presented by Professor David Baldus which showed that in the most serious category of cases (those with the highest number of aggravating circumstances), juries imposed death in 88% of all cases presented to them. *Id.* at 325 n.2 (Brennan, J., dissenting).

Writing for the majority, Justice Powell rejected Justice Stevens' proposal in a footnote on two grounds: (1) any recategorization of death eligibility would still create a borderline area in which the difference between those who received death and those who did not would be difficult to explain; and (2) even if a new category could be created, a prosecutor would have difficulty in applying it on a case-by-case basis. *Id.* at 318 n.45. It is difficult to know what to make of the second point because it appears to be based on a rejection of the core factual premise—that there is an identifiable subset of aggravated

B. Narrowing in Pursuit of Equality

While the ostensible role of the new law was to ameliorate arbitrariness, the effort to declare the death penalty unconstitutional was driven by those concerned about the racially discriminatory impact of capital punishment.²¹⁸ This issue remains a central concern.²¹⁹ There have been many empirical investigations of the issue, the vast majority of which show that discrimination based on the victim's race persists. Those who kill white people receive death at a greater rate than those who kill minorities.²²⁰ No investigator challenges this basic finding. To the extent there is a dispute, it relates to whether legitimate, non-racial factors explain the disparity. Statutorily defined aggravating circumstances are, of course, the most legitimate of these factors. These circumstances virtually always include felony murder.²²¹

Between 1976 and 1989, 6% of all murders involved African American defendants and white victims, while 18% of felony murders involved African American defendants and white victims. For the most common felonies that constitute an aggravating circumstance—rape, robbery, and burglary—the figures were 18.4%, 27.4%, and 19.9%, respectively. In other words, if no felony circumstance accompanied the murder, only 4% of all murders and non-negligent homicides nationally involved an African American defendant and a white victim.²²² Because felony murder is the quintessential aggravated homicide and because it is also the murder most likely to involve African American perpetrators and white victims,²²³ the prominence of white victims in capital cases is not surprising. Indeed, the law of aggravating circumstances encourages applying the death sentence to those who kill whites.²²⁴

cases in which death is consistently applied—which forms the basis of Justice Stevens' proposal.

218. MELTSNER, *supra* note 65, at 36.

219. *Graham v. Collins*, 113 S. Ct. 892, 903 (1993) (Thomas, J., concurring).

220. For a recent review of the literature and a report of a study concluding that this phenomenon is at work in Texas as well, consult Sorensen & Marquart, *supra* note 182, at 751-56, 775.

221. The Supreme Court in *Enmund* indicated that of the 36 states then authorizing capital punishment, only four completely excluded felony murder as a capital crime. *Enmund v. Florida*, 458 U.S. 782, 789 n.6 (1982).

222. Table 3.143 of The 1992 Bureau of Justice Sourcebook of Criminal Justice Statistics indicates that for 1991, with respect to homicides known to the police, 47% of all homicide victims were white and 50% were African American. Table 3.152 indicates that, with respect to homicides involving a single offender and a single victim, the 4838 white offenders killed 4399 white victims and 347 African American victims. The 5778 African American offenders killed 691 white victims and 5035 African American victims. Thus, about 12% of all murders and non-negligent homicides committed by African Americans involved a white victim whereas 7% of all murders and non-negligent homicides by whites involved an African American victim. SHR, *supra* note 194.

223. Rosen, *Felony Murder*, *supra* note 10, at 1117-20.

224. Rosen notes, "[T]he [felony murder] rule does allow a large, racially skewed group of defendants whose culpability has not been examined individually to be convicted of first degree murder, and thus to be potentially eligible for the death penalty." *Id.* at 1120.

In their concurring and dissenting opinions in *Graham v. Collins*, 113 S. Ct. 892, 903, 915 (1993), Justices Thomas and Stevens offered differing visions of the racial impact of giving jurors discretion in deciding whether to impose death. While the issue in *Graham* dealt with *mitigating* circumstances—specifically, whether the former Texas capital statute gave the sentencer the opportunity to give full play to mitigating circumstances such as youth and unfortunate background—Justice Thomas intimated support for a mandatory capital sentencing scheme as an antidote to the possibilities for racism inherent

If the new law of homicide is in fact in the business of driving racial discrimination from the institution of capital punishment, it appears to have had some rather surprising effects. While comparing those who were executed before 1957 with those who are on death row today may be equivalent to comparing oranges and tangerines, it gives some sense of how the problem has shifted in the last twenty years. Sellin's figures showed that between 1930 and 1957, more whites than African Americans had been executed in the Northeast (408 whites, 160 African Americans), the North Central (236 whites, 126 African Americans), and the West (436 whites, 347 African Americans). No state outside of the South executed more African Americans than whites. In the South, 1158 African Americans had been executed, compared with 540 whites. Of the seventeen Southern states, only the border states of West Virginia, Kentucky, and Oklahoma had executed more whites than blacks.

If one looks at those under sentence of death as of April 20, 1993, one sees a different picture: African Americans now outnumber whites on death row in only eight states. These states are:

PRISONERS UNDER SENTENCE OF DEATH²²⁵

<u>STATE</u>	<u>AFRICAN AMERICAN</u>	<u>WHITE</u>
Illinois	94	49
Pennsylvania	92	55
Ohio	65	57
Mississippi	31	21
Louisiana	26	13
Maryland	11	3
New Jersey	4	3
Delaware	8	3

In the three northern states with the largest death row population (Illinois, Pennsylvania, and Ohio), African Americans outnumber whites by a margin of 3 to 2. While suggesting causality undoubtedly pushes the data beyond what it can comfortably support, it is worth observing that each of these states includes felony murder and excludes "heinousness" from its list of aggravated circumstances.²²⁶ The same is true of Maryland.

Looking at the statistics from the other perspective—whether the racial composition of death row varies according to whether the jurisdiction employs felony murder alone or both felony murder and heinousness—one comes to

in any sentencing discretion. *Id.* at 903 (Thomas, J., concurring). Justice Stevens disagreed, but identified the "heinousness" aggravating circumstance as the one most likely to pose the danger that racial discrimination might infect the sentencing decision. *Id.* at 916 (Stevens, J., dissenting). Both Justices focused on the possible application of a standard rather than on the perpetrator-victim mix inherent in the aggravating circumstance. That is, they looked for racial effects as external to rather than inherent in the formal structure of capital murder law.

225. BUREAU OF JUSTICE STATISTICS, *supra* note 6, tbl. 6.126 at 670.

226. Illinois limits heinousness to murders of children under the age of 12. ILL. REV. STAT. ch. 720, para. 9-1(b)(7) (1992).

the same conclusion. As of April 1991, 1243 white and 966 African American prisoners were on the nation's death rows. If one limited the inquiry to only those fourteen states that did not embrace "heinousness" as an aggravating circumstance, there were almost the same number of African Americans (501) as whites (527).²²⁷ The states that embraced heinousness as a criterion had more than one and one-half white prisoners on death row for every one African American prisoner.²²⁸ While these figures do not prove that a doctrine focusing upon who is killed (for example, felony murder) tends to select African American defendants, they are certainly not inconsistent with that view. What they do contradict is the easy assumption that the more open-ended "heinousness" aggravating circumstance presents the most fertile breeding ground for racially motivated death decisions.²²⁹

At a minimum, there is no basis in any study to date or in the figures presented above for believing that the law of aggravating circumstances by *itself* eliminates or even successfully addresses the issue of racial inequality, which prompted the initial change in the law. To the extent that capital punishment is employed in a race-neutral manner, it is the consciousness with which prosecutors in the South as opposed to the North approach their charging decisions which probably makes the difference.²³⁰ If any legislation explains the difference in the racial composition of death row in the South, the most likely candidate is the Voting Rights Act of 1965, and not the new law of aggravated murder. After *Furman*, the death sentence has been imposed with more consistency, but this consistency does not seem to result from the law's identification of the death eligible, at least in those states with broad death eligibility statutes. Racial discrimination based on the identity of the defendant has apparently decreased, but taking the life of a white person remains a more serious offense than taking the life of a non-white person. Finally, narrowly drawn statutes (for example, those relying primarily on

227. The states which do not have an operative "heinousness" provision are Arkansas, California, Illinois, Indiana, Kentucky, Maryland, Montana, New Mexico, Ohio, Oregon, South Carolina, Texas, Pennsylvania, and Washington. Other explanations are more than possible. This list includes five of the six most populous states in the country that embrace capital punishment, and includes the six largest urban areas in which capital punishment is present: Los Angeles, Chicago, Philadelphia, San Francisco, Houston, and Dallas.

228. In Wolfgang's study of Philadelphia homicides during the years 1948-1952, he reported that the closeness of the relationship between victim and defendant seemed to have no relationship to the level of violence involved in the killing. However, if one limited the inquiry to spousal killings, there was a significant relationship: 44 out of the 53 men who killed their wives did so in a violent manner (for all homicides, about half were classified as violent and half as non-violent). WOLFGANG, *supra* note 47, at 209-14. Because spousal killings tend to be intraracial killings, the menu of aggravating circumstances may well have a race-specific effect on the population of death row.

229. A Pennsylvania study noted that the racial disparity in death sentences based on the race of the victim and the race of the offender grew more pronounced, rather than less so, once one looked only at those cases involving a felony circumstance. Karns & Weinberg, *supra* note 199, at 724. Pennsylvania also lists torture as an aggravating circumstance. While more narrowly defined than "heinousness" and therefore not directly relevant to the argument in the text, it is worth noting that, with respect to this aggravating circumstance, the race of the victim and offender made no difference except that whites who tortured non-whites to death were sentenced to death at a higher rate than any other group. *Id.* at 729.

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

felony murder) may even have the perverse effect of increasing the relative percentage of African Americans who actually face execution. Indeed, no evidence suggests that any gains in consistency that can be attributed to the new approach are a result of "narrowing" through aggravated circumstances rather than giving the jury standards to guide its decision as to death.

C. *The New Law as Doctrine*

The commentary to the draft of the Model Penal Code asserted that capital punishment had a "discernible and baneful effect on the administration of criminal justice."²³¹ The point holds true today. While the commentary drew attention to the effect of trials and executions, today the effect extends to the law itself.

The new law emphasizes behavioral as opposed to psychological criteria for imposing death. This emphasis defeats any effort to articulate a theory of why it is appropriate to kill some murderers and not others. To the extent that a unifying theme exists, it appears to be that society renders subject to execution those whose conduct proves most frightening to the potential sentencers.²³² This criterion invites rather than diminishes the very subjectivity and inconsistency which plagued the earlier law. Moreover, this test—translated into specific aggravating circumstances—virtually assures that the race of the victim will be a powerful and prominent determinant of who is prosecuted, convicted, and executed. Felony murder no longer stands as an exception to the general rule of criminal responsibility based on conscious choice to take life. Now, it is the paradigm of such responsibility, the worst crime in our lexicon.

The new approach theoretically serves the values of predictability and consistency. The categories are clear and understandable. Yet few who are not students of capital punishment could identify the factors that make one death eligible. Typically they are kept off-stage, away from the definition of murder, in lists of varying lengths in special sections of the codes devoted to capital punishment. The placement—indeed, the entire procedural thicket that has grown up around aggravating circumstances—has symbolic as well as practical importance. It reflects the abandonment of any notion that the death penalty can, will, or even should influence behavior. The surrender of any

231. Model Penal Code § 201.6 cmt. 1.

232. Barnett makes this point in connection with the role of the victim's status in determining the likelihood of a death sentence.

This status dimension has little explicit basis in the law. It is hard to avoid speculating that, in killings in which jurors can imagine themselves or their loved ones as victims, death penalties are more likely to be imposed. To say this is not to impute cynicism to the juries; when a case evokes genuine fear, considerations of deterrence may more greatly affect the sentencing decision than otherwise.

Barnett, *supra* note 178, at 1341.

Steven G. Gey argues that jurors are frightened because of the defendant's apparent incorrigibility. Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67, 116 (1992). This suggests that death is imposed for incapacitation or retributive reasons, not deterrent ones.

serious belief that the purpose of capital punishment is to prevent crime is deeply troubling. It suggests that, at bottom, the system is about processing criminals rather than controlling crime.

The new law presents the problem of over- and under-inclusiveness that characterized the prior law. Now, however, instead of exempting the impulsive or irrational killer, the law exempts the calculated and efficient killer. It is difficult to see this development as salutary; it suggests that it is worse to participate in a felony in which a co-felon unexpectedly kills a third party than it is to plan and execute a murder in a non-felony setting. These priorities are worse than strange; they undercut the basic understanding of moral seriousness reflected in the criminal law. And they do so in the misguided service of regularizing the application of the death penalty.

While some have argued for the retention of capital punishment on retributive grounds,²³³ no one suggests that the current collection of aggravating circumstances represents the killings that a rational retributivist would deem (a) morally equivalent and (b) worse than all other killings. The lack of effort does not surprise; it is difficult to articulate a theory of moral seriousness that makes no distinction between those who desire to bring about a particular forbidden result and those who do not. Yet this is precisely the law with respect to a large number of aggravating circumstances in a variety of states.

The problem extends beyond judicial reluctance to require a finding of *mens rea* with respect to specific aggravating circumstances. There is not even agreement that capital murder requires either the purpose or the willingness to kill. In certain states the felony-murder rule operates in a manner that permits the execution of those who did not intend to kill and did not themselves kill.²³⁴ Thus, twenty years after *Furman* it is legitimate for a state to have a law of murder that does not require the purpose or knowledge to kill combined with a law of aggravating circumstances that also has no such requirement.

Some have suggested that retribution does not require even-handedness as long as those who are executed morally deserve death.²³⁵ Whatever the force of this argument when applied to a decision to take a given individual's life, it does not justify a *law* which does not classify equivalent cases similarly. The capital punishment process at its most bloody still executes but a tiny fraction of all who kill. No coherent theory of moral desert holds that it does not matter whether we *attempt* to select morally equivalent cases.²³⁶

The failure to distinguish between those who intend to take life and those who do not, or between those who intend to inflict gratuitous suffering and

233. EARNST VAN DEN HAAG, PUNISHING CRIMINALS 219-20 (1975).

234. Rosen, *Felony Murder*, *supra* note 10, at 1126 n.62.

235. VAN DEN HAAG, *supra* note 233, at 219-21.

236. "[W]e also limit punishments in order to maintain a scale for different offenses which reflect, albeit very roughly, the distinction felt between the moral gravity of these offenses. Thus we make some approximation to the ideal of justice of treating morally like cases alike and morally different ones differently." Hart, *supra* note 36, at 453.

those who do not, or between those who kill in order to further a felony and those who do not, creates a difficulty which extends well beyond lack of theoretical congruence. The distinctions between intent, recklessness, negligence, and pure accident permeate the criminal law. They are the primary criteria by which society grades offenses. For any given prohibited result, if society makes a distinction at all (as invariably it does when the result is serious) it always treats the person whose purpose was to produce that result as the most serious offender.²³⁷ Perhaps the main reason for this is that choice underlies any theory of desert. Utilitarian considerations also play a role. One should have the greatest control over what one does purposely, and signalling that the most severe punishment awaits those who purposely violate the law should discourage such conduct. Whatever the reason, grading by intentionality provides the structure of the criminal law of the United States. Ignoring it robs the criminal law of any self-limiting principle.

The ready answer to these objections is that the new law is designed to achieve consistency and evenhandedness, not deterrence or retribution. While all may agree to the moral and utilitarian relevance of grading offenses in terms of the gap between the ends sought and the means employed or according to the level of pleasure a killer derives from the act, employing such criteria might lead to inconsistent results. Therefore, some believe it is better to exclude explicit inquiry into motive or pleasure or other psychological refinements²³⁸ and instead to concentrate on more measurable criteria. This is precisely the problem. The most serious crime—capital murder—has lost any legitimate purpose. Instead, its purpose seems to be to achieve the “foolish consistency” which, Emerson reminded us, is the “hobgoblin of little minds.”²³⁹

CONCLUSION

It has been suggested that a society that will not employ capital punishment is one that has lost confidence in its judgment and principles.²⁴⁰ However one evaluates that claim, it does suggest the pre-eminent problem with capital punishment today. Society has chosen rules that appear clear in favor of rules that demand moral judgment because it lacks faith that those who participate in the legal system are capable of making those judgments in a consistent and

237. Sometimes the law treats recklessness or gross recklessness as severely as it treats intentional conduct. However, it never defines a result brought about recklessly as more blameworthy than the same result brought about intentionally.

238. Some aggravating circumstances involve such principles. “Heinousness” does whenever it is interpreted to require that the defendant desire that the victim suffer before dying. A pecuniary motive is frequently identified as an aggravating factor. However, with the possible exception of Idaho, *State v. Creech*, 670 P.2d 463 (Idaho 1983), no state employs an aggravating circumstance which would allow the jury to evaluate motive or to weigh ends and means so as to sentence to death those who kill on no provocation, or because the person suddenly switches traffic lanes, or in order to establish their bona fides as a “made” man.

239. Ralph Waldo Emerson, *Spiritual Laws*, in *THE COLLECTED WORKS OF RALPH WALDO EMERSON* (Joseph Slater et al. eds., 1979).

240. VAN DEN HAAG, *supra* note 233, at 213.

non-discriminatory fashion. Society has chosen rules that appear to regularize decisions in favor of rules designed to control conduct because it has lost faith that potential criminals will conform their conduct to the law. Criminals have become the “other,” beyond our capacity to influence. Finally, society has chosen rules that mask rather than reveal vital criteria underlying capital decisions—the status of the victim, the race of the victim, and the location of the crime. Whether as a symptom or a cause, the “baneful” influence of the institution of capital punishment on the criminal justice system remains unchecked.