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## GUIDING CAPITAL SENTENCING DISCRETION BEYOND THE "BOILER PLATE": MENTAL DISORDER AS A MITIGATING FACTOR

JAMES S. LIEBMAN\* AND MICHAEL J. SHEPARD\*\*

*In five decisions handed down on July 2, 1976, the United States Supreme Court held that the death penalty may be imposed for the crime of murder, so long as there are clear standards to guide the sentencing authority and the sanction is not imposed mandatorily. The authors examine the eighth amendment doctrinal framework used by the Court in the July 2 Cases, with particular reference to the requirement that individualized mitigating information be considered in the sentencing decision. Illustrating that requirement, they contend that mental disorder should be considered as a possibly mitigating factor and then suggest a standard by which the sentencing authority might evaluate evidence of mental disorders, particularly retardation and sociopathy.*

### INTRODUCTION

The recent history of capital sentencing in the United States has centered around the inherent conflict between punishment administered mandatorily according to established standards and punishment administered in a discretionary manner with regard for the specific defendant.<sup>1</sup> In 1971, Professor Kalven asked a series of rhetorical questions that highlighted this normative tension between death imposed according to the rule of law and death dispensed with discretionary authority.<sup>2</sup> Agreeing with Justice Harlan's argument in

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1. See *Furman v. Georgia*, 408 U.S. 238, 245-48 (1972) (Douglas, J., concurring) (discussing American trend away from mandatory death sentence and contradictory trend away from discretionary procedures that inflict unequal penalties on equally guilty parties).

2. Kalven, *The Supreme Court, 1970 Term—Foreword: Even When a Nation Is at War—*, 85 HARV. L. REV. 3, 25 (1971), quoted in text accompanying note 337 *supra*.

*McGautha v. California*<sup>3</sup> that the factors that should guide a legislator or jury in deciding whether to impose death are too complex to be reduced to a regularized formula,<sup>4</sup> he asked whether the impossibility of administering the death penalty in accordance with legal rules does not disclose a fatal flaw in the nature of that penalty.<sup>5</sup> Because he did not share Justice Harlan's faith in the jury's discretion, Kalven was faced with an overwhelming dilemma—how to administer a punishment that should not be dispensed without mercy and yet should not be dispensed arbitrarily. He concluded that such a punishment must be per se unconstitutional.<sup>6</sup>

Kalven's views have not been accepted by a majority of the Supreme Court. Nonetheless, the force of his dilemma may explain the multiplicity of opinions when the Court next reviewed standardless jury discretion in *Furman v. Georgia*.<sup>7</sup> The five Justices concurring in the Court's disposition of the case could agree only that, whether or not the death penalty is ever constitutional, the eighth amendment certainly prohibits its arbitrary administration.<sup>8</sup> Thus, for

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3. 402 U.S. 183 (1971).

4. Kalven, *supra* note 2, at 25; see 402 U.S. at 204-08 (developing understandable standards appears to be beyond present human ability). In *McGautha*, the Court rejected due process challenges to the California and Ohio death penalty statutes. *Id.* at 186, 196. Although both statutes left the sentencing decision to the untrammelled discretion of the jury, the Court upheld them because it found that jury discretion is necessary to permit mercy to play a role in the decision and because it felt that standards adequate to govern every case are impossible to formulate. See *id.* at 203-08.

5. Kalven, *supra* note 2, at 25.

6. See H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 448-49 (1966) (no human being should be given discretion to decide whether to use the death penalty); text accompanying note 337 *infra*; cf. *McGautha v. California*, 402 U.S. 183, 249-50 (1971) (Brennan, J., with Douglas & Marshall, JJ., dissenting) (if the rule of law and power of the states to impose the death penalty irreconcilably conflict, the death penalty cannot supercede the rule of law).

7. 408 U.S. 238 (1972) (per curiam). The Court's decision was announced in a brief per curiam order holding that these death sentences, imposed under the Georgia and Texas death penalty statutes, violated the eighth and fourteenth amendments. *Id.* at 239-40. This order was followed by five concurring and four dissenting opinions; no two Justices joined in any of the concurring opinions.

8. See *id.* at 248-49, 248 n.11, 256-57 (Douglas, J., concurring) (discretionary statutes unconstitutionally permit discrimination to play unfettered role in sentencing decision); *id.* at 294, 305 (Brennan, J., concurring) (statute fails to guard against capricious selection of who shall be executed; death penalty per se unconstitutional); *id.* at 309-10 (Stewart, J., concurring) (statute unconstitutionally permits random and capricious imposition of death sentence); *id.* at 313 (White, J., concurring) (statute fails to provide meaningful basis for imposing death penalty); *id.* at 364, 370-71 (Marshall, J., concurring) (death penalty imposed discriminatorily on certain classes; concludes it is per se unconstitutional); see Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1692-99 (1974) (analysis of *Furman* opinions).

The Chief Justice, Justice Blackman, Justice Powell, and Justice Rehnquist each filed dissenting opinions. See 408 U.S. at 375 (Burger, C.J., dissenting); *id.* at 405 (Blackmun, J., dissenting); *id.* at 414 (Powell, J., dissenting); *id.* at 465 (Rehnquist, J., dissenting).

those jurisdictions that have resisted the historically disfavored solutions of either abolishing capital punishment or providing for mandatory death sentences,<sup>9</sup> *Furman* left the task of establishing standards for imposing the death penalty, a task called impossible a year earlier in *McGautha*.<sup>10</sup>

On July 2, 1976, the Court handed down five decisions, *Gregg v. Georgia*,<sup>11</sup> *Proffitt v. Florida*,<sup>12</sup> *Jurek v. Texas*,<sup>13</sup> *Woodson v. North Carolina*,<sup>14</sup> and *Roberts v. Louisiana*,<sup>15</sup> that together broke with *McGautha*<sup>16</sup> and held that the death penalty is constitutional only when the sentencing authority is provided adequate individualized information and is guided by clear and objective standards.<sup>17</sup> The

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9. See notes 36-39, 42 *infra* and accompanying text.

10. See 402 U.S. at 204 (identification before the fact of all characteristics that call for death penalty is task "beyond present human ability").

11. 428 U.S. 153 (1976).

12. 428 U.S. 242 (1976).

13. 428 U.S. 262 (1976).

14. 428 U.S. 280 (1976).

15. 428 U.S. 325 (1976). These five cases will be collectively referred to as the *July 2 Cases*.

16. The Court avoided an explicit overruling of *McGautha*, which was based on the due process clause of the fourteenth amendment, by premising its decisions on the eighth amendment. See *Gregg v. Georgia*, 428 U.S. 153, 195 n.47 (1976) (opinion of Stewart, Powell & Stevens, JJ.). See generally *McGautha v. California*, 402 U.S. 183, 196 (1971) (attack on jury's standardless discretion based on due process clause of fourteenth amendment); *Kalven*, *supra* note 2, at 22 (attack in *McGautha* focused not on constitutionality of death penalty itself, but on standards by which California imposed it). Nevertheless, Justices Stewart, Powell and Stevens conceded that a substantial tension exists between *McGautha* and *Furman* when read in light of the *July 2 Cases*. 428 U.S. at 195 n.47. But see *Woodson v. North Carolina*, 428 U.S. 280, 319-21 (1976) (Rehnquist, J., dissenting) (insistence on standards to guide sentencing squarely contrary to *McGautha*).

The question whether sentencing procedures must satisfy the eighth amendment's protection from cruel and unusual punishment, the due process clause of the fourteenth amendment, or both remains unresolved. Compare *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion) (sentencing process must comport with due process as trial must; due process violated when sentence based in part on confidential information not disclosed to defendant), with *id.* at 363-64 (White, J., concurring) (conclusion of Court concerning procedure for selecting persons for death penalty should be based solely on eighth amendment; no reason to address due process).

17. See *Roberts v. Louisiana*, 428 U.S. 325, 333-36 (1976) (opinion of Stewart, Powell & Stevens, JJ.) (Louisiana mandatory death penalty statute violates eighth and fourteenth amendments because it both fails to focus on particular circumstances and character of offender and lacks standards to guide jury); *Woodson v. North Carolina*, 428 U.S. 280, 301-05 (1976) (opinion of Stewart, Powell & Stevens, JJ.) (North Carolina mandatory death penalty statute unconstitutional due to its inconsistency with prevailing social values and its failure to provide objective standards or particularized consideration of individual defendant); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (opinion of Stewart, Powell & Stevens, JJ.) (Texas statute constitutional because it authorizes jury consideration of individual mitigating circumstances and provides adequate guidance); *Proffitt v. Florida*, 428 U.S. 242, 252, 259-60 (1976) (opinion of Stewart, Powell & Stevens, JJ.) (Florida statute constitutional because trial judge must focus on individual circumstances of both defendant and crime, and appellate process ensures against

judgment of the Court in each of the *July 2 Cases* was announced in a plurality opinion endorsed by Justice Stewart, Justice Powell, and Justice Stevens. The plurality<sup>18</sup> confronted the issues avoided in *Furman* and held that the death penalty for the crime of murder is not per se unconstitutional<sup>19</sup> so long as it is not imposed mandatorily.<sup>20</sup> It consequently accepted and began to grapple with the unenviable chore of defining guidelines that, in Justice Harlan's words, are neither "meaningless 'boiler-plate' [n]or a statement of the obvious that no jury would need."<sup>21</sup>

Much of the task lies ahead. The plurality conceded that the guidelines laid out in the *July 2 Cases* establish only that it is possible to construct a capital sentencing system that resolves the constitutional concerns of *Furman* and that each capital sentencing system henceforth must be analyzed on an individual basis to determine its constitutionality.<sup>22</sup> Its own analysis of the five statutes presented did not venture very far beyond holding that in three cases the sentencing schemes permitted an adequate degree of guided individualization,<sup>23</sup> but that in two others the mandatory death penalty schemes did not.<sup>24</sup> This tentative evaluation of the statutes left many crucial questions unexplored. As a preliminary matter, the Court has not yet firmly resolved whether the substantive eighth amendment doctrine laid out by the plurality in *Gregg* to justify the death penalty in the abstract also controls the constitutional analysis of particular statutory schemes or even particular sentences of

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arbitrary imposition of death sentence); *Gregg v. Georgia*, 428 U.S. 153, 189-90 (1976) (opinion of Stewart, Powell & Stevens, JJ.) (constitutional death penalty statute, such as Georgia's, must direct and limit discretion and must take into account the circumstances of the crime and the character of the defendant).

18. The phrase "the plurality" hereinafter refers to the five opinions rendered by Justices Stewart, Powell, and Stevens in the *July 2 Cases*. See *Gregg v. Georgia*, 428 U.S. at 158; *Proffitt v. Florida*, 428 U.S. at 244; *Jurek v. Texas*, 428 U.S. at 264; *Woodson v. North Carolina*, 428 U.S. at 282; *Roberts v. Louisiana*, 428 U.S. at 327.

19. *Gregg v. Georgia*, 428 U.S. at 168-87 (rejecting argument that capital punishment unconstitutional per se under eighth and fourteenth amendments); accord, *Roberts v. Louisiana*, 428 U.S. at 331; *Woodson v. North Carolina*, 428 U.S. at 285; *Jurek v. Texas*, 428 U.S. at 268; *Proffitt v. Florida*, 428 U.S. at 247.

20. *Jurek v. Texas*, 428 U.S. at 276; *Proffitt v. Florida*, 428 U.S. at 252, 259-60; *Gregg v. Georgia*, 428 U.S. at 189-90.

21. *McGautha v. California*, 402 U.S. 183, 208 (1971).

22. See *Gregg v. Georgia*, 428 U.S. at 195 (1976).

23. *Jurek v. Texas*, 428 U.S. at 276; *Proffitt v. Florida*, 428 U.S. at 252, 259-60; *Gregg v. Georgia*, 428 U.S. at 189-90.

24. *Roberts v. Louisiana*, 428 U.S. at 333-36; *Woodson v. North Carolina*, 428 U.S. at 302-05.

individual defendants.<sup>25</sup> The resolution of this issue will permit the Court to confront the much more difficult questions of what standards to use in determining the individualizing information that a sentencing authority must consider, what degree of guidance must delimit the sentencer's discretion, and what legal body is the final arbiter of proper sentencing procedures.<sup>26</sup>

This article will argue that consistency with the eighth amendment requires that every aspect of a particular sentencing procedure be scrutinized in terms of the plurality's substantive eighth amendment doctrine. In the first part it reviews the *July 2 Cases* and extracts from them the doctrine used in analyzing the abstract constitutionality of capital punishment and the constitutionality of particular death sentencing statutes. It attempts to build from this foundation a framework that resolves the issues untouched by the *July 2 Cases*

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25. At many points, however, the plurality implicitly sanctioned this extension of its abstract doctrinal analysis. See, e.g., *Woodson v. North Carolina*, 428 U.S. at 294-96; *Gregg v. Georgia*, 428 U.S. at 184, 186; notes 39, 42, 58 & 64 *infra* and accompanying text. But cf. *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 72-76 (1976). This article notes that the Court's failure in the *July 2 Cases* to relate the reasons underlying retention of the death penalty to the specific statutory system under consideration is particularly troubling in light of the critical eighth amendment requirement of principled sentencing. *Id.* at 74-75. It suggests that if the personal characteristics considered by a sentencing authority inadequately relate to purposes of the death penalty, the Court may be forced to reconsider the per se constitutionality question. *Id.* at 76. Professor Charles Black has leveled similar criticism at the *July 2 Cases*. See Black, *Due Process for Death: Jurek v. Texas and Companion Cases*, 26 CATH. U.L. REV. 1, 13-16 (1976) (specific facts of cases reveal that Court has not solved arbitrariness condemned in *Furman*; cases fail to correspond eighth amendment considerations to specific procedures employed).

26. See *The Supreme Court, 1975 Term*, *supra* note 25, at 64. The issue is pressing. See *Lockett v. Ohio*, 49 Ohio St. 2d 48, 358 N.E.2d 1062 (1976), *cert. granted*, 98 S. Ct. 261 (1977) (No. 76-6997); *Bell v. Ohio*, 48 Ohio St. 2d 270, 358 N.E.2d 556 (1976), *cert. granted*, 97 S. Ct. 2971 (1977) (No. 76-6513). At issue in both cases is the constitutionality of the Ohio capital punishment statute, OHIO REV. CODE ANN. §§ 2929.03-04 (Page, 1975). Both petitioners contend that the narrowness of the statutory provisions on mitigating circumstances leads to a virtually mandatory death sentence. Brief for Petitioner at 50, *Lockett v. Ohio* (No. 76-6997); Brief for Petitioner at 12-13, *Bell v. Ohio* (No. 76-6513). The Court must decide whether the individualization goal set forth in the *July 2 Cases* requires reversal because of the sentencing courts' failure to consider such characteristics as immaturity, low intelligence, absence of a prior criminal record, prospects for rehabilitation, and such circumstances as minor participation in the crime and lack of intent to commit murder.

After some hesitation, the Court avoided deciding the same issue with respect to Arizona's death penalty in *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 97 S. Ct. 2988, *application for suspension of cert. and for stay of execution denied*, 98 S. Ct. 8 (Rehnquist, Circuit Justice), *response to reh. petition requested*, 98 S. Ct. 49, *petition for reh. denied*, 98 S. Ct. 537 (1977). *Richmond* failed to allege that he was prevented from presenting any of the mitigating factors foreclosed in *Lockett* and *Bell*. 98 S. Ct. at 9. Nor, apparently, was the failure to consider petitioner's sociopathological condition considered worthy of Supreme Court review. *Id.* For another challenge to Arizona's capital punishment statute, see *State v. Jordan*, 114 Ariz. 452, 561 P.2d 1224 (1976), *stay of execution pending Supreme Court disposition granted*, 97 S. Ct. 2970 (1977) (No. 76-6965).

themselves. In the second part, this framework is applied to a specific issue—whether mental disorder should be considered a mitigating factor in the process of seeking, imposing, or reviewing a sentence of death. The article will demonstrate the viability of mental disability as a mitigating factor and will sketch out a standard that a sentencing authority might use in testing the mitigatory potential of a defendant's evidence of mental disorder. This standard is reduced to a four-factor mitigatory scheme and, in the last part, applied to two specific classes of disordered persons: retardates and sociopaths.

## I. A FRAMEWORK FOR CONSTITUTIONAL CAPITAL PUNISHMENT: THE *JULY 2* CASES AND BEYOND

### THE DOCTRINAL FRAMEWORK OF THE *JULY 2* CASES: THE EVOLVING STANDARDS OF DECENCY

The Supreme Court's first foray into the thicket of capital sentencing after *Furman* produced twenty-four opinions spread over the five *July 2 Cases*.<sup>27</sup> Although the opinions defy attempts to derive a single coherent guide for sentencing authorities seeking to impose capital punishment,<sup>28</sup> a relatively clear rationale underlies the Court's preliminary conclusion that capital sentencing does not necessarily violate the eighth amendment prohibition of cruel and unusual punishment. In evaluating the abstract constitutionality of the death

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27. See *Roberts v. Louisiana*, 428 U.S. 325, 325-63 (1976) (six separate opinions); *Woodson v. North Carolina*, 428 U.S. 280, 280-324 (1976) (six separate opinions); *Jurek v. Texas*, 428 U.S. 262, 262-79 (1976) (four separate opinions); *Proffitt v. Florida*, 428 U.S. 242, 242-61 (1976) (three separate opinions); *Gregg v. Georgia*, 428 U.S. 153, 153-241 (1976) (five separate opinions).

The Court divided into three groups in the five cases. Justices Stewart, Powell, and Stevens formed the plurality that upheld the death penalty in *Gregg*, *Proffitt*, and *Jurek* and avoided the statutes in *Woodson* and *Roberts*. *Roberts v. Louisiana*, 428 U.S. at 325-36; *Woodson v. North Carolina*, 428 U.S. at 280-305; *Jurek v. Texas*, 428 U.S. at 262-77; *Proffitt v. Florida*, 428 U.S. at 242-60; *Gregg v. Georgia*, 428 U.S. at 153-207. Justices Brennan and Marshall adhered to their position in *Furman* that the death penalty is unconstitutional per se and would have found all five statutes unconstitutional. *Roberts v. Louisiana*, 428 U.S. at 336-37; *Woodson v. North Carolina*, 428 U.S. at 305-06; *Proffitt v. Florida*, 428 U.S. at 227-41; *Jurek v. Texas*, 428 U.S. at 227-41; *Gregg v. Georgia*, 428 U.S. at 227-41. Justice Blackmun, writing for himself, and Justices White, Rehnquist, and Chief Justice Burger writing separate concurrences and dissents, would have found all five statutes constitutional. *Roberts v. Louisiana*, 428 U.S. at 337-63; *Woodson v. North Carolina*, 428 U.S. at 306-24; *Jurek v. Texas*, 428 U.S. at 277-79; *Proffitt v. Florida*, 428 U.S. at 260-61; *Gregg v. Georgia*, 428 U.S. at 207-27.

28. See *United States v. Kaiser*, 545 F.2d 467, 472 (5th Cir. 1977) (expressing relief at being spared chore of producing definitive exegesis of "complex if not confounding" *July 2 Cases*; statute held unconstitutional on basis of *Furman*).

penalty in *Gregg*, the plurality applied a two-part test<sup>29</sup> derived from the substantive limits found in previous eighth amendment cases<sup>30</sup> and based on the proposition the "amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>31</sup> The first part of the test focuses on contemporary values or "public attitudes" concerning the sanction under consideration;<sup>32</sup> the second concentrates on the "dignity of man."<sup>33</sup>

#### PUBLIC ATTITUDES

In *Gregg* the plurality defined the public attitudes element of the test as an inquiry, based on objective indicia, into public perceptions of the appropriateness of the death penalty.<sup>34</sup> Consistent with its goal of objectivity, the plurality confined its search for public attitudes to historical and contemporary source material reflecting the institutional deliberations on criminal justice by a democratic society.<sup>35</sup>

29. See 428 U.S. at 173. This analysis of whether capital punishment is inherently cruel and unusual is adopted by reference in the other four opinions. See note 19 *supra*.

30. See, e.g., *Robinson v. California*, 370 U.S. 660, 666 (1962) (contemporary values dictate that any punishment for narcotic addiction inherently cruel and unusual); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion) (eighth amendment requires that punishment conform to evolving standards of decency and accord with the dignity of man; denationalization of deserter unconstitutional); *Weems v. United States*, 217 U.S. 349, 368 (1910) (eighth amendment concerned not only with physical pain but also with proportionality of penalty to crime).

31. *Gregg v. Georgia*, 428 U.S. at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

32. *Id.*

33. *Id.*; see *The Supreme Court, 1975 Term, supra* note 25, at 64-65.

34. 428 U.S. at 173.

35. Because the plurality relied on indicia with a nexus to institutional deliberations and cited raw public opinion polls only sparingly, the importance of polls to the death penalty's constitutionality is subject to considerable doubt. See *Woodson v. North Carolina*, 428 U.S. at 298 & n.34 (public opinion polls used by plurality only to confirm that mandatory death penalty passed by post-*Furman* legislatures not evidence of renewed acceptance of that procedure); *Gregg v. Georgia*, 428 U.S. at 181 n.25 (evidence of public opinion polls used to supplement statewide referenda). Nonetheless, it is worthy of note that a public opinion poll compiled after the *July 2 Cases* found that the public is willing to impose the death penalty because it is perceived as morally just and as serving a useful purpose. Thomas, *Eighth Amendment Challenges to the Death Penalty: The Relevance of Public Opinion*, 30 VAND. L. REV. 1005, 1023 (1977). Bearing out the dangers of relying on public opinion data that has not been subjected to institutional constraints, however, this researcher also found that much of the public's support for capital punishment is grounded in a belief in the utility of death as a deterrent—a belief the plurality found inconclusively supported by the relevant empirical data. See *id.* at 1028-30; note 56 *infra* and accompanying text.

Legislative enactments,<sup>36</sup> statewide referenda,<sup>37</sup> and jury verdicts<sup>38</sup> were among the indicia relied on to demonstrate that a substantial number of United States citizens accept the death penalty as an appropriate punishment in some circumstances. The plurality also considered historical evidence of the evolution of public attitudes toward the death penalty and concluded that the long history and the current acceptance of death as a punishment for murder indicate that public attitudes support the death penalty on the abstract level.<sup>39</sup>

The inquiry into public attitudes was not restricted, however, to the abstract analysis in *Gregg*. In *Robert's* and *Woodson*, public attitudes played an important role in the plurality's evaluation of the particular statutes,<sup>40</sup> both of which made the death penalty mandatory for

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36. *Gregg v. Georgia*, 428 U.S. at 179-81. The plurality found the overwhelming legislative response to *Furman* a strong indication of society's approval of the death penalty for murder. Congress and at least thirty-five state legislatures enacted new statutes in an attempt to circumvent the defects that invalidated the statutes considered in *Furman*. *See id.* at 179-80, 179 n.23, 180 n.24 (listing statutes).

37. *See id.* at 181 (only statewide referendum on issue since *Furman* adopted constitutional amendment to overrule California Supreme Court holding that capital punishment per se unconstitutional under state constitution).

38. *See id.* at 181-82 (jury a reliable, objective index of contemporary values). Although juries impose the death penalty infrequently—a reluctance undoubtedly reflecting public perception of the enormity of the sanction—they continue to invoke it in a considerable number of extreme cases. *Id.* at 182 & n.26.

39. *See id.* at 176-78, 182 (reviewing common law, intent of Framers, and Supreme Court case law). In a subsequent case, the Court again looked to public attitudes derived from history, precedent, legislative acts, and the response of juries in evaluating the constitutionality of death as a punishment for rape. In concluding that the statute was unconstitutional, Justice White relied in part on his finding that in recent years discretionary death sentencing for rape has become increasingly less acceptable. *See Coker v. Georgia*, 97 S. Ct. 2861, 2866-69 (1977) (Georgia only jurisdiction to permit death for rape of adult women and 9 out of 10 juries in Georgia refuse to impose it).

In *Coker*, the Court had to evaluate conflicting evidence in the indicators of public attitude it examined: the death penalty statute *had* been passed by the state legislature and juries *had* imposed capital punishment under it in a few cases. *See id.* (Georgia statute as revised after *Furman* included rape among capital offenses; at least six juries had imposed death sentence for rape). It resolved the dilemma by balancing the objective data of limited local acceptance against an overwhelming national trend against imposing death for rape. *Id.* at 2867. *Cf. Woodson v. North Carolina*, 428 U.S. at 249 n.25 (clarity of juries' historical rejection of mandatory death sentences outweighs ambiguous, contrary expressions of legislative attitudes). The use of a balancing test to determine whether a statute conforms with public attitudes and the hegemony of national attitudes over local ones in making the balance will be significant factors in the Court's future evaluations of the constitutionality of statutes and of their application to particular classes of defendants.

40. It is unclear why the plurality failed to refer to public attitudes in *Gregg*, *Proffitt*, and *Jurek* when making the second level of analysis into the constitutionality of particular statutes. The Court may have relied on the evidence before it in the abstract analysis of public attitudes as an endorsement not only of the death sentence per se, but also of the death sentence as applied in those three cases. This possibility is evidenced by a reference in *Woodson* to polls indicating that many who support retention of the death penalty prefer that it be administered

certain crimes.<sup>41</sup> Its conclusion that the statutes were unconstitutional was based in part on a strong historical trend away from mandatory death penalty statutes.<sup>42</sup> The plurality dismissed the recent rash of mandatory statutes as a misguided attempt to comply with *Furman* and not as evidence of any resurgence in public acceptance of mandatory death sentencing.<sup>43</sup> This use of public attitudes as a touchstone for testing statutory sentencing procedures in individual cases demonstrates that this aspect of the doctrinal framework of the *July 2 Cases* is extremely important. Because public attitudes must be

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with regard for the circumstances of each case and the character of the defendant. 428 U.S. at 298 n.34 (quoting Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1267 (1974)).

41. See LA. REV. STAT. ANN. § 14.30(1) (West 1974) (conviction for murder committed with specific intent during armed robbery automatically merits death sentence); N.C. GEN. STAT. § 14-17 (Supp. 1975) (murder committed during robbery punished with death).

42. See *Roberts v. Louisiana*, 428 U.S. at 336 (mandatory death penalty statute rejected 130 years ago; reintroduction intolerable); *Woodson v. North Carolina*, 428 U.S. at 288-301 (history of mandatory statutes reveals that practice has been rejected). Between 1838 and 1963, all state legislatures rejected mandatory statutes as unduly harsh and rigid, largely in response to jury refusals to deliver guilty verdicts for the crime of murder. *Id.* at 291-92; see *id.* at 295-96 (pattern of jury death sentencing suggests that contemporary society rejects death as an appropriate sanction for a substantial number of convicted murderers).

Since *Roberts* and *Woodson*, both the United States Supreme Court and state supreme courts have declared unconstitutional statutes that impose death automatically for first degree murder, capital murder, or murder with aggravating circumstances. See, e.g., *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 638 (1977) (per curiam) (possibility of raising defenses during trial for murder of police officer does not compensate for inability to raise mitigating factors at sentencing); *Green v. Oklahoma*, 428 U.S. 907 (1976) (remanding case involving mandatory death sentencing statute, in light of *Roberts* and *Woodson*); *State v. Spence*, 367 A.2d 983, 988 (Del. 1976) (automatic capital punishment for first degree murder cruel and unusual under *Woodson* and *Roberts*); *State v. Duren*, 547 S.W.2d 476, 480 (Mo. 1977) (capital murder carrying mandatory death sentence unconstitutional); *People v. Davis*, 43 N.Y.2d 17, 33, 371 N.E.2d 456, 464, 400 N.Y.S.2d 735, 743-44 (1977) (possibility of raising defenses during trial for murder of police officer does not compensate for inability to raise mitigating factors at sentencing; mandatory death penalty unconstitutional); see note 43 *infra*.

43. *Woodson v. North Carolina*, 428 U.S. at 298 & n.34. In response to *Furman*, many state legislatures feared that the greater the degree of jury discretion present in the death sentencing process the greater the likelihood that a capital punishment provision would be deemed unconstitutional. Therefore, numerous state legislatures passed acts providing for mandatory capital punishment. Many of these have already been held unconstitutional. See, e.g., *Rockwell v. Superior Court*, 18 Cal. 3d 420, 446-48, 556 P.2d 1101, 1116-18, 134 Cal. Rptr. 650, 665-67 (1976) (Clark, J., concurring) (historical account of how California enacted unconstitutional mandatory death penalty in response to confusing *Furman* ruling); *State v. Spence*, 367 A.2d 983, 985-86 (Del. 1976) (legislature and state court misread *Furman* as requiring the abrogation of all sentencing discretion, resulting in enactment of statute unconstitutional under *July 2* decisions); *Commonwealth v. Moody*, 22 CRIM. L. REP. (BNA) 2249, 2250 (Pa. Sup. Ct. Nov. 30, 1977) (legislature's effort to cure constitutional defects of pre-*Furman* statute by narrowly limiting mitigating factors resulted in violation of *July 2 Cases* principles). For an account of one frenzied state legislature's reaction to the *Furman* decision, see Lehman, *Some Legislative History and Comments on Ohio's New Criminal Code*, 23 CLEV. ST. L. REV. 8, 15-23 (1974) (new capital punishment statute drafted without benefit of scholarly legal analysis of *Furman* ruling).

considered in evaluating whether death penalty statutes are constitutional, on their face or as applied, not only the sanction of death in the abstract but also the system adopted to administer the sanction in each instance must conform to the standards of decency of the institutional majority.<sup>44</sup>

#### HUMAN DIGNITY

Unlike public attitudes, the element of the eighth amendment test requiring that punishment accord with the "dignity of man"<sup>45</sup> cannot be applied by reference to objective reflections of the value modern society places on human life. Rather, a judge must look to standards established by the courts themselves to determine whether this part of the test is satisfied.<sup>46</sup> The human dignity requirement represents one attempt to cure the arbitrariness and capriciousness condemned in *Furman* as intolerable when the sanction is death.<sup>47</sup> The plurality in

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44. Although the plurality did not state that a bifurcated proceeding that involves the jury in the sentencing decision is essential to a constitutional statute, it did indicate that one of the jury's most important functions is to ensure that contemporary community values are meshed into the penal system. See *Woodson v. North Carolina*, 428 U.S. at 295; *Gregg v. Georgia*, 428 U.S. at 190-92. Moreover, the three constitutional statutes all included split trial proceedings involving the jury at both levels. See *Jurek v. Texas*, 428 U.S. at 267 (separate sentencing proceeding before same jury); *Gregg v. Georgia*, 428 U.S. at 158-60 (same); *Proffitt v. Florida*, 428 U.S. at 248-49 (separate sentencing proceeding but jury decision only advisory). Indeed, in *Gregg* the plurality noted that a bifurcated proceeding is the best way to combine jury involvement with adequate guidance. 428 U.S. at 190-91. Thus, the public attitudes part of the eighth amendment test may require that the decision to impose death on a particular defendant for a particular crime be made by a sentencing authority in close touch with contemporary community values. But see note 99 *infra*.

Subsequent cases have also considered a bifurcated proceeding an important factor in evaluating the constitutionality of the statute. See, e.g., *People v. Velez*, 88 Misc. 2d 378, 405, 388 N.Y.S.2d 519, 537 (1976) (*July 2 Cases* construed as requiring bifurcated trial, with jury acting as conscience of community; state death penalty struck down for not allowing court or jury opportunity to consider any mitigating or aggravating circumstances); *Commonwealth v. Moody*, 22 CRIM. L. REP. (BNA) 2249, 2249 (Pa. Sup. Ct. Nov. 30, 1977) (provision for bifurcated proceeding approved; nevertheless, statute unconstitutional because it limits mitigating circumstances jury may consider); *State v. Pierre*, 572 P.2d 1338, 1345 (Utah 1977) (statute that provides for bifurcated trial and permits consideration of unlimited mitigating circumstances constitutional).

45. *Gregg v. Georgia*, 428 U.S. 153, 173, 182 (1976) (plurality opinion).

46. See *Coker v. Georgia*, 97 S. Ct. 2861, 2868 (1977) (evidence of public attitudes does not wholly decide case; eighth amendment also requires that Court bring its own judgment to bear on statute imposing death penalty for rape); cf. *Gregg v. Georgia*, 428 U.S. 153, 174 (1976) (plurality opinion) (eighth amendment imposes duty on courts to review constitutionality of punishment and to overturn the act of the elected legislature if necessary).

47. See *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion) (quoting *Furman v. Georgia*, 408 U.S. 288, 313 (1972) (White, J., concurring)). For a discussion of other, primarily procedural, attempts to achieve *Furman's* goal of a sentencing system free from caprice, see note 71 *infra*.

the *July 2 Cases* focused on the problems raised in *Furman* and gave substantive and procedural content to the human dignity requirement to ensure that the death penalty serves a valid purpose in accord with penological justifications, is not disproportionate to the crime committed, and is administered in an orderly manner that admits of distinguishing the cases in which it should be imposed from those in which it should not.<sup>48</sup> The plurality's own citation of authorities indicates that the human dignity analysis may draw on a wide variety of legal, historical, sociological, and philosophical sources.<sup>49</sup>

*Substantive Requirements.* Substantively, human dignity requires that a punishment not be excessive; that is, it may not impose unnecessary infliction of pain nor may it be grossly out of proportion to the crime.<sup>50</sup> Thus, to avoid gratuitous infliction of pain, a punishment must first have some recognized penological justification;<sup>51</sup> for the death penalty specifically, the plurality identified two principal purposes: retribution and deterrence.<sup>52</sup> Second, even if a

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48. See *id.* at 173, 187, 188; cf. England, *Capital Punishment in the Light of Constitutional Evolution: An Analysis of Distinctions Between Furman and Gregg*, 52 NOTRE DAME LAW. 596, 608-09 (1977) (far from being retreat from *Furman*, the *July 2 Cases* follow that case in consistent pattern of constitutional history).

49. See, e.g., *Jurek v. Texas*, 428 U.S. at 271 n.6 (quoting Model Penal Code); *Gregg v. Georgia*, 428 U.S. at 184 n.30 (British legal views); *id.* at 184-85 & nn. 31-32 (sociological studies); *id.* at 184 (views on social morality).

50. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion). Justice White and Justice Blackmun added their endorsement of this aspect of the human dignity test to that of the *July 2 Cases* plurality by joining with the plurality in *Coker v. Georgia*, 97 S. Ct. 2861, 2865-66 & n.4 (1977) (statute imposing death for rape must accord with both public attitudes and human dignity).

51. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion).

52. *Id.* The plurality also noted another frequently discussed penological justification: protecting society by the incapacitation of known criminals. *Id.* at 183 n.28. However, it did not rely on this justification, perhaps because incarceration is almost equally effective in preventing future crimes by the criminal involved. See *The Supreme Court, 1975 Term*, *supra* note 25, at 72 (life imprisonment without possibility of parole would serve protection purpose equally well).

The fourth commonly discussed penological justification for a particular punishment, rehabilitation, can of course be of no relevance to the death penalty. Because capital punishment serves at best only three of the four justifications, it might be argued that the evidence required to show that these three purposes are actually accomplished should be greater than might be necessary when the punishment might also rehabilitate. Cf. *Gardner v. Florida*, 430 U.S. 349, 360 (1977) (extinction of any possibility of rehabilitation makes death penalty qualitatively different from all other sentences); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion) (death is extreme sanction, suitable only to most extreme of crimes); *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (death penalty unique in its irrevocability and in the irrelevance of rehabilitation as penological justification); *id.* at 289 (Brennan, J., concurring) (unusual severity of death most clearly demonstrated by its finality and enormity).

death sentence serves legitimate goals of punishment it may still be found unconstitutional if disproportionate to the crime for which it is imposed.<sup>53</sup>

The plurality defined retribution as a society's expression of moral outrage at offensive conduct and stated that a legal channel for retribution is necessary to prevent vengeance outside the legal process.<sup>54</sup> Thus, certain crimes are so reprehensible that only the death penalty is adequate to reflect the revulsion felt by society toward the perpetrator.<sup>55</sup> In contrast to the subjective nature of retribution as a penological justification, the utility of capital punishment as a deterrent for those contemplating similar crimes ought to be an objectively demonstrable fact. Nevertheless, the plurality did not find conclusive evidence either that the death penalty does or does not deter.<sup>56</sup> Faced with evidence it thought conflicting, the plurality opined that the death penalty probably would not deter the murderer who acts in a moment of passion, but could significantly deter those whose murders are coolly calculated.<sup>57</sup> Beyond that, its abstract decision that the death penalty is not per se unconstitutional deferred to state legislatures the factual determination whether death

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53. See *Coker v. Georgia*, 97 S. Ct. 2861, 2866 n.4 (1977). In *Coker*, the Court found that the statute may have served penological goals, but held it unconstitutional after finding both that death is disproportionate to the crime of rape and that public attitudes generally align against death sentences for rape.

The scope of the disproportionality factor is unclear. So far the Court has treated this aspect of the human dignity requirement as primarily relevant to the offense-oriented inquiry into whether capital or some other punishment may be imposed for a specific crime. See, e.g., *Coker v. Georgia*, 97 S. Ct. 2861, 2866 (1977) (punishment of death disproportionate to crime of rape); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) (denationalization disproportionate to crime of desertion for one day); *Weems v. United States*, 217 U.S. 349, 381 (1910) (hard labor and chains for twelve years disproportionate to crime of record falsification). But cf. *Woodson v. North Carolina*, 428 U.S. 280, 305 n.40 (1976) (plurality opinion) (reserving question whether punishment of death disproportionate for murderer allegedly acting under duress and not fully participating in crime). The role this factor will play in the evaluation of whether death may be imposed on a specific individual for an admittedly heinous crime such as murder remains in doubt. In keeping with this article's focus on distinctions among offenders rather than offenses, the proportionality question will receive little attention.

54. *Gregg v. Georgia*, 428 U.S. at 183.

55. *Id.* at 184.

56. *Id.* at 185. Opponents of capital punishment argue that deterrent effects can never be accurately measured. See C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974) (a "scientific" conclusion impossible); note 265 *infra*; cf. Thomas, *supra* note 35, at 1009, 1030 (most research indicates that deterrence not served by capital punishment; thus, public attitudes based on deterrence questionable).

57. *Gregg v. Georgia*, 428 U.S. at 185-86.

will deter.<sup>58</sup> Relying on its judgment that death may adequately serve two penological justifications, the plurality concluded that the substantive prohibition of gratuitous infliction of pain will not necessarily bar all capital punishment.<sup>59</sup>

Although the plurality analyzed in some detail the abstract retributive and deterrent functions of the death penalty,<sup>60</sup> it did not expressly relate this analysis to the three statutes found constitutional.<sup>61</sup> This omission does not mean, however, that a specific statute need not serve those penological justifications either on its face or as applied. First, the Court was not required to decide whether individual circumstances in these cases substantially affected the deterrent or retributive impact of each application of the death penalty. Rather, the challenges to the particular statutes apparently were limited to claims that the unguided power of the prosecutor to

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58. *Id.* at 184-86 (proof of deterrent effect inconclusive; therefore Court defers to legislative determination). The plurality's deference to this legislative choice of a rational means to achieve a valid social end is somewhat reminiscent of the low level of review employed by the Supreme Court in economic due process decisions. See *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488 (1955) (Court will no longer strike down state laws regulating business because they might be unwise or improvident, or inharmonious with a school of thought; statute regulating eye care a rational means to cure evil at hand). As in the due process area, the Court was apparently concerned in the *July 2 Cases* with promoting a flexible approach that would both enable states to respond to local needs and relieve courts of the arguably nonjusticiable task of deciding whether and to what degree death deters. See *Gregg v. Georgia*, 428 U.S. at 186; cf. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952) (debatable issues regarding business, economic, and social affairs left to legislative decision). See also *The Supreme Court, 1975 Term*, *supra* note 25, at 72 n.70 (listing articles endorsing "compelling state interest" review, but rejecting argument).

Nevertheless, the plurality's deference to a legislative finding that death is an effective deterrent was apparently not intended to signal the end of judicial involvement in the deterrence issue. First, the decision to leave the issue to legislators seems premised on its complexity and inconclusiveness. See *Gregg v. Georgia*, 428 U.S. at 187 (conclusion that death may deter based on "absence of more convincing evidence"). Because the plurality did not rule out the possibility that conclusive evidence may be developed in the future, it did not foreclose the question from some day becoming wholly justiciable. Moreover, the Justices made clear that once a legislature purports to have found that death does deter, the courts must still decide whether the imposition of death in the particular case furthers the deterrence end found legitimate. See *id.* (praising Georgia legislators' efforts to pinpoint crimes and criminals affected by capital punishment's deterrence); cf. *Moore v. City of East Cleveland*, 431 U.S. 494, 520-21 (1977) (Stevens, J., concurring) (lack of substantial relationship between legitimate goals of zoning and particular rule prohibiting two first cousins from living together violated due process; municipal regulation falls under intermediate standard of review); see note 68 *infra*.

59. *Gregg v. Georgia*, 428 U.S. at 187. The plurality also cautioned that courts should not invalidate a category of punishment merely because another less severe penalty could serve the same penological justifications; rather, courts should only determine whether the penalty is so lacking in penological justification that it constitutes gratuitous infliction of pain. *Id.* at 182-83.

60. *Id.* at 182-87; see notes 54-59 *supra* and accompanying text.

61. The *July 2 Cases* have been criticized for their failure to relate the purposes of retribution and deterrence to the statutes themselves. See *The Supreme Court, 1975 Term*, *supra* note 25, at 72-73.

plea bargain and the governor to commute death sentences permitted unconstitutionally arbitrary grants of mercy to certain individuals,<sup>62</sup> and that the enumerated aggravating or mitigating circumstances were so vague as to be meaningless.<sup>63</sup> Second, the plurality did note without any elaboration that many of the statutes passed after *Furman* reflected a responsible effort to impose death for those crimes and on those criminals for which it is a most effective deterrent.<sup>64</sup> Finally, the sentencing authority in each case had stated the findings used to reach the verdict; these findings did reflect penological justifications to some degree.<sup>65</sup> In the absence of a direct claim of injury by the defendant, the Court might well have relied on these factors in assuming that the specific statutes as applied adequately served some penological justification.<sup>66</sup>

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62. See *Jurek v. Texas*, 428 U.S. at 274 (defendant asserted arbitrariness still pervaded state system through plea bargaining, jury consideration of lesser included offenses, and Governor's commutation power); *Proffitt v. Florida*, 428 U.S. at 254 (same); *Gregg v. Georgia*, 428 U.S. at 199 (defendant focused on discretion of prosecutor, jury, and Governor in considering any murder case).

63. See *Jurek v. Texas*, 428 U.S. at 274-76 (defendant claimed that statute permitting jury to impose death penalty on finding that defendant a continuing threat to society unconstitutionally vague); *Proffitt v. Florida*, 428 U.S. at 254-58 (defendant claimed that mitigating and aggravating factors enumerated in statute vague and overbroad); *Gregg v. Georgia*, 428 U.S. at 200-04 (defendant claimed statute so broad and vague as to fail in reducing risk of arbitrary infliction of death sentences).

64. *Gregg v. Georgia*, 428 U.S. at 186.

65. In *Gregg* the death penalty could not be imposed unless the jury found one of ten statutorily enumerated aggravating circumstances. The jury found that the offense was committed while the defendant was engaged in armed robbery and was committed for the purpose of receiving money. 428 U.S. at 161. In *Proffitt*, after the jury recommended the death sentence, the judge, as required by the statute, supported his decision in writing by enumerating four aggravating factors, including a finding that the murder was particularly atrocious and cruel. 428 U.S. at 246-47. In *Jurek* the jury supported the death sentence with a finding, required under the statute, that the murder was deliberate and that the defendant probably would be a continuing threat to society. 428 U.S. at 267-68. See note 66 *infra*.

66. All three cases involved premeditated murders committed during a defendant's perpetration of a separate, serious felony. In *Gregg* the defendant was convicted of murdering two men who had picked him up while hitchhiking with a companion. The shooting incident occurred during a roadside stop; the defendant waited for the two men to return to the car, then shot and robbed them and drove away in their car. 428 U.S. at 158-60. After admitting to police that he killed the two men "in cold blooded murder just to rob them," *id.* at 214 (White, J., concurring), he was indicted and convicted for armed robbery and two counts of murder. *Id.* at 160. In *Proffitt* the evidence indicated that the defendant fatally stabbed a sleeping man with a butcher knife and repeatedly struck the victim's wife during a burglary. He was convicted of first degree murder, which the judge characterized as premeditated as well as committed during the course of a felony. 428 U.S. at 245-46. In *Jurek* defendant was charged with kidnapping a ten-year-old girl, strangling her with his bare hands, and then throwing her in a river to drown. 428 U.S. at 264-67.

Although it can be argued that these cases satisfy the penological justification requirement, commentators who have closely examined the statutes and the circumstances of each case disagree. See Black, *supra* note 25, at 14 (scathing criticism of adequacy of guidance in statutes

The plurality could not have intended to ignore the retribution issue simply because a legislature determines that a particular crime sufficiently provokes society's moral outrage and so includes it in the statutes as a conclusive aggravating circumstance. Such an approach would seem at odds, if not fatally inconsistent, with the plurality's rejection of mandatory death penalty statutes for specific crimes.<sup>67</sup> Similarly, failure to analyze the specific procedures and the specific verdicts in terms of their deterrent impact would deny a defendant the right to demonstrate that his execution would amount to gratuitous infliction of pain.<sup>68</sup> Thus, although the plurality in the *July 2 Cases* was not compelled to carry the substantive inquiry into penological justifications beyond the abstract level of analysis, the doctrine in those opinions dictates that the Court must do so in the proper case.<sup>69</sup>

*Procedural Requirements.* Most of the plurality's analysis of the individual statutes challenged in the *July 2 Cases* focused on the arbitrariness condemned in *Furman*.<sup>70</sup> To answer the issues directly

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upheld in *July 2 Cases*); *The Supreme Court, 1975 Term, supra* note 25, at 73-74 (factors actually included in each statute demonstrate that none of these states were guided by deterrent or retributive goals).

67. This offense-specific assumption of the retributive value of the death penalty is implicit in imposing that penalty whenever an aggravating circumstance, such as murder committed during a robbery as in *Proffitt* and *Gregg*, is present; as such, it seems very similar to the mandatory death statutes rejected in *Roberts* and *Woodson*. See *Roberts v. Louisiana*, 428 U.S. at 336; *Woodson v. North Carolina*, 428 U.S. at 305. At least one court has already recognized this danger. See *Purdy v. State*, 343 So. 2d 4 (Fla. 1977). In *Purdy* a man was convicted of sexual battery of a child under eleven years of age. The trial court justified imposition of the death penalty on the ground that the aggravating circumstance of heinousness was present. Although impressed by the enormous impact of the crime on the child, the Florida Supreme Court overturned the death sentence because nothing in the trial court's finding distinguished the crime from any other violation of the same statute. Therefore, affirming the death penalty in the case would mean that anyone convicted of that crime could be sentenced to death, a result the Florida Supreme Court felt was unconstitutional under *Woodson* and *Roberts*. *Id.* at 4, 6.

68. At least one commentator has argued that the plurality's apparent deference to the legislative decision on deterrence indicates only that the defendant has the burden of showing lack of deterrence. See Stotzky, *Capital Punishment*, 31 U. MIAMI L. REV. 841, 850-51 (1977).

69. Two cases now before the Supreme Court present legal questions and factual circumstances inviting consideration of the penological rationale for imposition of the death penalty on the particular defendants. Characteristics of the offenders and the offenses in both cases raise doubts whether an execution of the defendant in either case will serve deterrence or retributive goals. See *Lockett v. Ohio*, 49 Ohio St. 2d 48, 52-53, 67, 358 N.E.2d 1062, 1066-67, 1074 (1976) (21-year-old drug-addicted woman with arguably low I.Q. participated in robbery of pawnshop during which shop owner murdered; during homicide defendant remained outside), *cert. granted*, 98 S. Ct. 261 (1977) (No. 76-6997); *Bell v. Ohio*, 48 Ohio St. 2d 270, 278, 282, 358 N.E.2d 556, 564 (1976) (drug-using juvenile participated in armed robbery and kidnapping that resulted in homicide; defendant allegedly did not physically commit murder), *cert. granted*, 97 S. Ct. 2971 (1977) (No. 76-6513).

70. Although the substantive content of the human dignity test of the eighth amendment draws upon *Furman*, see notes 47-48 *supra* and accompanying text, *Furman* itself did not reach

raised in that case, the plurality enumerated procedural requirements necessary to satisfy the human dignity element of the eighth amendment test.<sup>71</sup> First, the plurality held that the fundamental respect for humanity identified in *Gregg* as the source of substantive requirements<sup>72</sup> also indispensably requires consideration of the character and record of the individual defendant and the circumstances of his offense.<sup>73</sup> It applied this preliminary holding by determining whether each statute had a mechanism whereby a defendant could bring individualized information to the attention of the sentencing authority. The statutes found constitutional all permitted consideration of any mitigating circumstances the defendant might seek to establish,<sup>74</sup> while those held unconstitutional failed to provide for consideration of the character and record of the individual defendant.<sup>75</sup>

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substantive issues because of the glaring procedural defects found in the statutes. See *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) (eighth amendment cannot tolerate imposition of death in wanton and freakish manner).

71. The *July 2 Cases* did not exhaust the nonarbitrariness implications of *Furman*. Both Supreme Court and state decisions reflect a higher degree of concern for procedural fairness when the outcome of a trial can result in the taking of an individual's life. See, e.g., *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (increased notice and discovery rights of capital defendants with respect to presentence reports); *Furman v. Georgia*, 408 U.S. 238, 286-87, 287 n.34 (1972) (Brennan, J., concurring) (recognizing special state practices surrounding death penalty, including two-stage trials, automatic appeals, and 12-person juries); *Reid v. Covert*, 354 U.S. 1, 77 (Harlan, J., concurring) (while fifth and sixth amendments should not necessarily apply to all overseas trials of military dependents, trials for capital offenses require special constitutional considerations).

This gradual but certain progression toward the recognition of "eighth amendment due process" has its parallel in the first amendment area. See Note, *Search and Seizure of the Media: A Statutory Fourth Amendment and First Amendment Analysis*, 28 STAN. L. REV. 957, 985-86, 985 nn.164-65, 988 & n.84 (1976) (special concerns of first amendment mandate a higher level of due process).

72. See 528 U.S. at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)).

73. *Woodson v. North Carolina*, 428 U.S. at 304 (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

74. See *Jurek v. Texas*, 428 U.S. at 271 (eighth amendment requirement of individualized sentencing satisfied by construction of statutory question to allow defendant to bring any mitigating circumstances in his case to attention of jury); *Proffitt v. Florida*, 428 U.S. at 250-52, 250 n.8 (absence of limiting language in section of statute enumerating mitigating factors indicates that court must focus on individual circumstances of crime and character of defendant); *Gregg v. Georgia*, 428 U.S. at 189, 196-97 (statute that authorizes jury consideration of any appropriate mitigating or aggravating circumstances satisfies requirement that crime and character of defendant be considered).

75. See *Roberts v. Louisiana*, 428 U.S. at 333-34 (mandatory death statute impermissibly affords no meaningful opportunity for consideration of mitigating factors); *Woodson v. North Carolina*, 428 U.S. at 304 (mandatory death statute treats all persons convicted of offense as undifferentiated mass). See also *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 637 (1977) (per curiam) (mandatory death sentence for murder of police officer invalid; insufficient allowance for consideration of mitigating circumstances). Since the *July 2 Cases*, at least one state court has held that a statutory enumeration of mitigatory circumstances that limits those that may be considered is unconstitutional because the defendant must be permitted to introduce anything relevant to mitigation. See *Commonwealth v. Moody*, 22 CRIM. L. REP. (BNA) 2249, 2249-50 (Pa. Sup. Ct. Nov. 30, 1977).

Second, the plurality held that the procedural aspect of human dignity requires objective standards to guide and render reviewable the process for imposing the death penalty.<sup>76</sup> Adequate and careful guidance of the jury as it deliberates pervades every other aspect of our legal system and was deemed especially necessary when the jury decides whether a convicted defendant shall live or die.<sup>77</sup> Furthermore, by requiring that the sentencing authority specify the factors on which it relied in reaching a decision, the plurality claimed meaningful appellate review would be made possible.<sup>78</sup>

After stating the two elements of the guided individualization requirement, the plurality first noted that they are best satisfied by a statute that calls for a bifurcated proceeding during which the sentencing authority is provided with all relevant information and with standards to guide its use of that information.<sup>79</sup> It then examined each statute individually to determine whether the guided individualization requirement was satisfied. In *Roberts* and *Woodson*, the plurality invalidated the mandatory death statutes in part because they vested standardless sentencing power in the jury<sup>80</sup> and in part because they failed to allow the jury to consider particularized information concerning the character and record of the defendant relevant to the sentencing decision.<sup>81</sup> The plurality emphasized the separate importance of each element of guided individualization, implying that even if a statute allows a defendant to introduce evidence in mitigation of the death penalty, the sentence might still be unconstitutional if the sentencing authority is not also provided

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76. *Woodson v. North Carolina*, 428 U.S. at 302.

77. *See Gregg v. Georgia*, 428 U.S. 153, 193 (1976) (plurality opinion) (that juries be carefully guided is a hallmark of American legal system).

78. *Id.* at 195.

79. *Id.*; *see note 44 supra*; *note 98 infra*.

80. *See Roberts v. Louisiana*, 428 U.S. at 334; *Woodson v. North Carolina*, 428 U.S. at 302. The plurality noted that the mandatory statutes were drafted in an attempt to withdraw all jury discretion in response to *Furman*. Experience indicates, however, that the same unbridled discretion inheres in a mandatory statute because of the jury's ability to convict for a degree of crime that does not mandate death. *See Roberts v. Louisiana*, 428 U.S. at 334-36; *Woodson v. North Carolina*, 428 U.S. at 302-03.

81. *See Roberts v. Louisiana*, 428 U.S. at 333; *Woodson v. North Carolina*, 428 U.S. at 303-04. The plurality left open the possibility that an extremely narrow statute that defines a capital crime in terms of the character and record of the individual offender might constitutionally impose a mandatory death sentence on a prisoner serving a life sentence who murders again. *Roberts v. Louisiana*, 428 U.S. at 334 n.9. This would indicate that the strong penological justification in such a case might offset the limitation on the jury's ability to evaluate mitigating factors. *See id.* *But cf. Roberts (Harry) v. Louisiana*, 431 U.S. 633, 636-37, 637 n.5 (1977) (*per curiam*) (although murder of police officer may be aggravating circumstance *per se*, to bar all mitigating circumstances still unconstitutional; question of prisoner serving life sentence left open).

standards adequate to guide and regularize the decisionmaking process.<sup>82</sup>

One of the most puzzling aspects of the *July 2 Cases* is the plurality's failure to bifurcate consistently its own treatment of guided individualization. Although the separate importance of guidance and individualized treatment was emphasized in *Roberts* and *Woodson*,<sup>83</sup> the plurality did not as clearly distinguish these two facets of the guided individualization requirement when applying it to the facts of *Proffitt*, *Gregg*, and especially *Jurek*. In *Proffitt* and *Gregg*, the plurality enunciated the requirement but then found it readily satisfied by statutes that present mitigating and aggravating factors to the sentencing authority, direct the sentencing authority to balance those factors in a specified manner, and provide for appellate review.<sup>84</sup>

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82. See *Roberts v. Louisiana*, 428 U.S. at 333-34 (lack of guidance and lack of individual focus listed as separate deficiencies); *Woodson v. North Carolina*, 428 U.S. at 302-03 (same). The separate nature of the two aspects of guided individualization is borne out by the Supreme Court's actions after *Furman*. Among the hundreds of cases in which the Court vacated death sentences and remanded by order, several were cases in which defendants had been capitally sentenced following murder convictions under statutes that included bifurcated procedures and allowed for the consideration of mitigating circumstances. Under the explanation of *Furman* in the *July 2 Cases*, the only possible constitutional defect of the death sentencing systems disapproved in these cases was their failure to provide the jury as sentencing authority with standards to guide their decisions. See *State v. Delgado*, 161 Conn. 536, 290 A.2d 338 (1971), *vacated & remanded*, 408 U.S. 940 (1972) (disapproving CONN. GEN. STAT. § 53-10 (1958)); *Tea v. State*, 453 S.W.2d 179 (Tex. Crim. App. 1970), *vacated & remanded*, 408 U.S. 937 (1972) (disapproving TEX. CODE CRIM. PRO. art. 37.07 (Vernon 1972)).

83. See notes 80-82 *supra* and accompanying text.

84. See *Proffitt v. Florida*, 428 U.S. at 251-53 (Florida Statute protects against arbitrariness by requiring jury and judge to make findings regarding aggravating and mitigating circumstances and to impose death only if mitigating facts insufficient to outweigh those sufficiently aggravating; automatic supreme court review provided to ensure consistent results); *Gregg v. Georgia*, 428 U.S. at 196-98 (Georgia statute protects against arbitrariness by requiring jury to find at least one of 10 specified aggravating circumstances beyond reasonable doubt and permitting consideration of any other aggravating or mitigating circumstances; automatic appeal to supreme court ensures consistency in sentencing). The Florida statute provides that the jury's decision is reached by majority vote and is advisory only; the judge makes the final determination. FLA. STAT. ANN. §§ 921.141(2)-(3) (West Supp. 1977). In Georgia, the jury makes the ultimate decision after a presentence hearing. GA. CODE ANN. § 27-2534.1(c) (Supp. 1977). Neither statute imposes any limitation on the mitigating circumstances that may be relevant. *Proffitt v. Florida*, 428 U.S. at 250 n.8; *Gregg v. Georgia*, 428 U.S. at 197.

It is unclear whether Florida practice after the *July 2 Cases* adheres to the Supreme Court's construction of the death penalty statute. Six days after the plurality opined that the Florida statute's listing of mitigating factors did not foreclose other factors from consideration, the Florida Supreme Court stated otherwise. See *Cooper v. State*, 336 So. 2d 1133, 1139 (Fla. 1976) (per curiam) (sole issue in capital hearing is to examine statutorily itemized aggravating and mitigating circumstances; evidence on other matters has no place). Moreover, since *Cooper* Florida courts have ignored the statute's nonexclusive language and have tended merely to itemize the statutory factors present in each case, or at best to characterize other mitigating circumstances as fitting into one of those categories. See *Gibson v. State*, 351 So. 2d 948, 951 n.6 (Fla. 1977) (per curiam) (opinion lists mitigating categories and follows each with findings of fact in

Although these statutes do not explicitly provide detailed standards to guide the jury in its consideration of the relevant factors, the plurality was satisfied that clear and objective standards adequate to guide the jury's discretion inhere in the provisions that direct the jury's attention to specific circumstances of the crime.<sup>85</sup> On the other hand, in *Jurek* the plurality seemed to view guidance merely as an incidental by-product of the jury's consideration of any mitigating information presented by the defense.<sup>86</sup> The opinion radically compressed the two requirements identified in *Woodson* and *Roberts*, suggesting that the information itself fulfills the guidance requirement and that the guiding information need consist of nothing more structured than presentation by the defense of whatever mitigating information it chooses to put before the jury or judge.<sup>87</sup>

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mitigation; no allegation that any specific nonstatutory factor foreclosed from court consideration); *Barclay v. State*, 343 So. 2d 1266, 1270-71 (Fla. 1977) (per curiam) (trial judge listed each statutory aggravating and mitigating circumstance and followed each with relevant findings; no allegation of foreclosure of any specific factor).

85. See *Proffitt v. Florida*, 428 U.S. at 251-52; *Gregg v. Georgia*, 428 U.S. at 197-98.

86. See *Jurek v. Texas*, 428 U.S. at 276 (by permitting defense to bring any mitigating circumstances before jury, Texas ensures adequate guidance). This aspect of the *July 2 Cases* has borne the brunt of the criticism focused on the decisions. See Black, *supra* note 25, at 13-15 (none of three statutes eliminates arbitrary lenience or harshness; decision in *Jurek* most egregious); *The Supreme Court, 1975 Term*, *supra* note 25, at 71-72 (*Jurek* especially difficult to reconcile with eighth amendment requirement of principled application of death penalty; *Gregg* and *Proffitt* also troubling). Professor Black argued that the malleability of the Texas statute was especially visible in a subsequent case; the defendant in that case was sentenced to die under the Texas statute affirmed in *Jurek*, although the evidence showed that the defendant himself had not committed the murder. See Black, *supra* note 25, at 14-15 (discussing *State v. Smith*, 540 S.W.2d 693 (Tex. Crim. App. 1976), *cert. denied*, 97 S. Ct. 1341 (1977)). The imposition of the death penalty was apparently based on his failure to show remorse and on a previous conviction for possession of marijuana. See *State v. Smith*, 540 S.W.2d at 296 (these factors "of extreme importance" to sentencing). Professor Black concluded that the *July 2 Cases* had failed to establish that it is possible to construct a system that can answer the dilemma raised in *Furman* and *McGautha*. Black, *supra* note 25, at 16; see notes 1-10 *supra* and accompanying text.

87. The statute upheld in *Jurek* does not explicitly provide for consideration of mitigating factors. Instead it requires the jury to decide whether the defendant acted unreasonably in response to alleged provocation or whether there is a likelihood that the defendant will commit violent criminal acts in the future. TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2)-(3) (Vernon Supp. 1976-1977). In upholding the Texas statute, the plurality relied heavily on two Texas appellate decisions, which held that in answering those questions the court should ask the jury to consider whatever mitigating evidence the defense decides to introduce. *Jurek v. Texas*, 428 U.S. at 272-73 (discussing *Jurek v. State*, 522 S.W.2d 934, 939-40 (Tex. 1975); *Smith v. State*, 540 S.W.2d 693, 696-97 (Tex. Crim. App. 1976)); see *Whitmore v. State*, No. 52,325 (Tex. Crim. App. Oct. 13, 1976) (unpublished opinion) (post-*July 2 Case*; evidence admitted and instruction given regarding temporary insanity due to intoxication as mitigating circumstance). Admitting that the Texas statute called on the jury to make a difficult prediction of future behavior, the plurality nonetheless found in *Jurek* that the statute sufficiently guided the jury's decision precisely because that decision must necessarily be based on consideration of all mitigating information. 428 U.S. at 275-76.

Despite the plurality's questionable acceptance of the guidance provided under the Texas statute, the importance of the guidance requirement as a separate component essential to a constitutional statute cannot be denied. The plurality in *Gregg* clearly stated that merely providing the jury with relevant information cannot guarantee that it will use the information properly in deciding to impose a certain punishment.<sup>88</sup> Accordingly, *Jurek* probably should be confined to its most limited holding: In the absence of a request for instructions or for other guidance, a statute may survive eighth amendment scrutiny despite its provision of relatively vague general standards to guide the jury's consideration of mitigating information.<sup>89</sup> Thus, although the *July 2 Cases* firmly focused on the nature of adequate guidance essential to a constitutional death penalty, that requirement apparently need not be expressly articulated in the statute itself for it to pass prima facie constitutional muster. Instead, the *July 2 Cases* seem to require that the defendant himself initiate the guidance process by a request for instructions.<sup>90</sup>

The doctrinal framework laid out in *Gregg* and fleshed out in the other *July 2 Cases* constitutes the starting point for any legislative, executive, or judicial decisionmaking body facing the death penalty issue. In light of the importance of that framework and the difficulty of divining it from the twenty-four opinions scattered through the *July 2 Cases*, it is useful to summarize with a graphic representation.<sup>91</sup>

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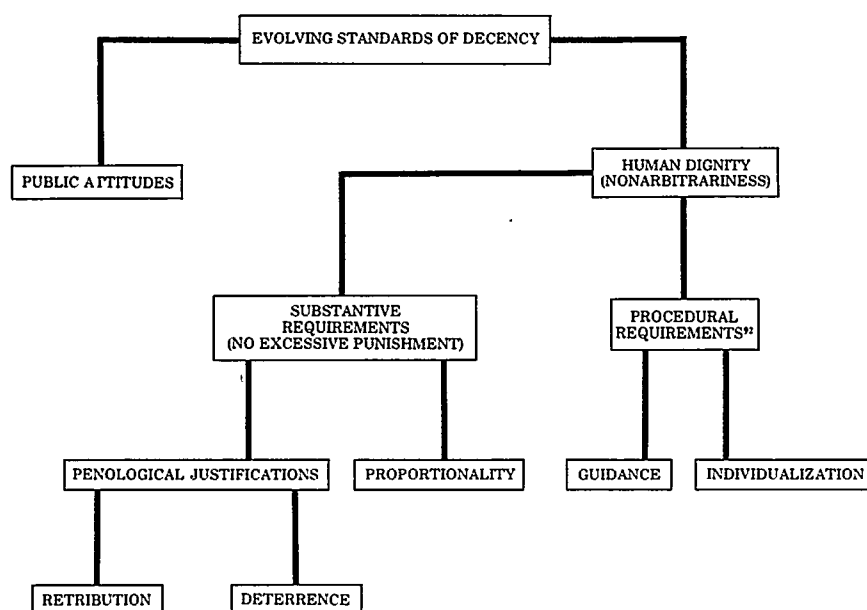
88. See 428 U.S. at 192-93 (jury routinely guided by instructions on law to apply to evidence adduced at trial and this rule no less true at capital sentencing); *id.* at 195 n.46 (sentencing system providing jury with vague standards could violate *Furman's* proscription of arbitrariness).

89. Although the defendant did argue on appeal that the statute provided insufficient guidance for the jury, he did not request any particular instruction at trial concerning any mitigating factor, as he might have done. See *Whitmore v. State*, No. 52,325 (Tex. Crim. App. Oct. 13, 1976) (unpublished opinion). While there may be many reasons for the omission, it is interesting to note that since the decision in the *July 2 Cases*, the defendant in *Jurek* has filed a habeas corpus action, claiming that his two lawyers, one of whom was disbarred soon after trial and one of whom was not yet a member of the bar, committed so many errors in directing his defense that he was denied constitutionally adequate representation. Among the errors cited was the failure to request instructions at the sentencing phase. See *Jurek v. Estelle*, Civ. No. V-77-1 (filed S.D. Texas 1978).

90. This requirement may be implicit in the plurality's repeated reference in *Jurek* to the jury's normal role in the American criminal justice system. *Jurek v. Texas*, 428 U.S. at 275-76. In the typical jury trial situation, the law has established what information the jury may hear, but opposing counsel are often required to request instructions to guide its analysis of that information. Cf. *id.* at 276 (Texas death sentencing system assigns jury its normal decisionmaking role).

91. The confusing language used by the plurality in the *July 2 Cases* has caused other commentators to derive a somewhat different framework from the cases. See, e.g., England, *supra* note 48, at 602-04 (analysis fails to establish relationship between "human dignity" and "excessiveness", between "human dignity" and "proportionality", or between "human dignity"

## DOCTRINAL FRAMEWORK OF THE EIGHTH AMENDMENT



and “guided individualization”); Tao, *The Constitutional Status of Capital Punishment: An Analysis of Gregg, Jurek, Roberts and Woodson*, 54 J. URB. L. 345, 346-52 (1977) (same); *The Supreme Court, 1975 Term, supra* note 25, at 64-65 (analysis confuses overall eighth amendment “evolving standards of decency” with objective “public attitudes” requirement and fails to relate “guided individualization” to “human dignity”). Moreover, confusion concerning the exact doctrinal model envisioned by the Court may also inhere in the interrelationship of the several tests used by the plurality as well as in the overlapping indicia relevant to each. For example, the product of legislative deliberations on the death penalty may reflect not only the public attitude that death is morally acceptable if imposed in particular contexts, but also may evidence society’s need for retribution from those who commit a certain act. Nevertheless, the inquiry into public attitudes and the inquiry into penological justifications involve the courts in fundamentally different modes of analysis. The former is an objective look by the court at the decision of another body without regard to the basis of that decision while the latter is a question for the Supreme Court itself to resolve. See note 131 *infra* and accompanying text.

92. Human dignity (nonarbitrariness) also is the source of other procedural requirements for a constitutional capital sentencing system not dealt with in the *July 2 Cases*. See note 71 *supra*.

## BEYOND THE JULY 2 CASES: ESTABLISHING STANDARDS

The Supreme Court has unequivocally held that standardless death sentencing is unconstitutional, and yet in the *July 2 Cases* it failed to provide much direction concerning what the source of standards should be.<sup>93</sup> Although those cases clearly establish the importance of permitting a defendant to introduce whatever mitigating evidence he has,<sup>94</sup> they do little to clarify the implementation of the mitigating factor requirement. Consequently, lawmakers and jurists face a series of confounding questions: what standards should guide a legislature in drafting a death penalty statute; what standards should guide a judge in deciding whether a particular piece of allegedly mitigating evidence is relevant to the sentencing decision; if it is relevant, what standards should a judge use in framing instructions to the jury to guide their use of that evidence? Consistent with the previous discussion of the implications of the eighth amendment doctrinal framework laid out in the *July 2 Cases*, this section suggests that the answers to these questions lie in that doctrinal framework; the tests articulated by the plurality in the *July 2 Cases* were intended to apply not only to the death penalty in the abstract but also to the statutes drafted to implement the penalty and to individual applications of the penalty.<sup>95</sup> If the doctrinal framework is not applied in this manner, death sentences are unlikely to be consistent with the penological purposes underlying capital punishment or with public attitudes towards imposing the death penalty on a given defendant for a particular crime. Accordingly, mitigating factors should be defined and jury instructions should be formulated in each case by reference to the eighth amendment test used to sustain the death penalty in the abstract. Unless that doctrinal framework pervades every aspect of the sentencing process, any resulting death sentence is constitutionally invalid, and upon appellate review of that sentence the question of the death penalty and its per se constitutionality must

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93. *E.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 302 (1976) (plurality opinion) (mandatory death statutes merely papered over the problem of unchecked jury discretion); *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) (eighth and fourteenth amendments cannot tolerate wanton, freakish imposition of death penalty); see *Gregg v. Georgia*, 428 U.S. 153, 188-89 (1976) (plurality opinion) (jury discretion must be suitably limited in death penalty cases); notes 84-91 *supra* and accompanying text.

94. See notes 74-75 *supra*; note 119 *infra* and accompanying text.

95. This extension of the *July 2 Cases* doctrinal framework seems to be implicit in the cases themselves. See *Gregg v. Georgia*, 428 U.S. 153, 184, 186 (1976) (plurality opinion) (noting that valid post-*Furman* statutes reflect community belief that certain crimes should be punished by death and that many are responsible efforts to define crimes and criminals in a way that most effectively deters other crime); note 25 *supra*.

arise again.<sup>96</sup>

The analysis of the problems surrounding administration of the mitigating factor requirement can be elucidated best through the following hypothetical situation, which is typical of what judges are likely to face in adjudicating future death penalty cases.<sup>97</sup> The jury has not been persuaded by the defendant's insanity defense during the first phase of a bifurcated trial<sup>98</sup> and has found him guilty of first degree murder. In the sentencing phase, the defendant attempts to offer additional evidence of mental disorder that he claims should be considered as a mitigating factor. He also requests that the judge instruct the jury<sup>99</sup> to consider all mitigating evidence heard at both

96. See *The Supreme Court, 1975 Term*, *supra* note 25, at 75-76 (if standards for principled application impossible to formulate, constitutionality issue may be revived); *cf.* Black, *supra* note 25, at 16 (statutes held constitutional in *July 2 Cases* demonstrate impossibility of producing procedure fit for choosing who shall die).

97. Although elucidation of the eighth amendment requirements for a constitutional death penalty is relevant at every stage of decisionmaking from the passage of the statute to the executive pardon, it is most critical at the judicial sentencing hearing because at that stage the decision is made to impose death upon a specific individual for a specific act. Moreover, the plurality in the *July 2 Cases* emphasized the important responsibility of appellate tribunals in policing the sentencing authority's compliance with the eighth amendment. See *Proffitt v. Florida*, 428 U.S. 242, 254-58 (1976) (plurality opinion) (claim of vagueness rejected because Supreme Court of Florida will give content to categories and means to balance them); *Gregg v. Georgia*, 428 U.S. 153, 200-04 (1976) (plurality opinion) (claim of vagueness and overbreadth rejected because no reason to assume Supreme Court of Georgia will permit open-ended construction).

98. Although the plurality did not equate use of a bifurcated proceeding with constitutionality, it did strongly recommend that approach as the "best" means of meeting the *Furman* requirements. *Gregg v. Georgia*, 428 U.S. 153, 190-91, 197 (1976) (plurality opinion); see note 44 *supra*.

99. All three statutes found constitutional in the *July 2 Cases* provided for some input by juries into the sentencing decision. See *Jurek v. Texas*, 428 U.S. 262, 267 (1976) (plurality opinion) (jury's answer to question concerning defendant's proclivity for future violence determines the sentence); *Proffitt v. Florida*, 428 U.S. 242, 249 (1976) (plurality opinion) (jury suggests an advisory sentence that carries considerable weight if it recommends against the death penalty); *Gregg v. Georgia*, 428 U.S. 153, 164-66 (1976) (plurality opinion) (jury must find at least one of 10 enumerated aggravating circumstances before a death sentence will be accepted; its recommendation binds the court). The plurality noted that jury sentencing is desirable in capital cases to maintain a link between community values and the criminal system. *Gregg v. Georgia*, 428 U.S. at 190. On the other hand, the plurality noted that the Court has never held that jury sentencing is essential and cited special problems that complicate the task of affording jurors the guidance the plurality considered necessary to overcome inconsistency in death sentencing. *Id.*; see note 44 *supra*.

Because the Court approved the jury as merely an advisory body in *Proffitt*, two state courts have held that a defendant in a capital case does not have a right to a jury trial at the penalty stage. See *State v. Jordan*, 114 Ariz. 452, 457, 561 P.2d 1224, 1229 (1976) (that judge imposes sentence instead of jury without consequence), *stay of execution pending Supreme Court disposition granted*, 97 S. Ct. 2970 (1977) (No. 76-6955); *State v. Weind*, 50 Ohio St. 2d 224, 229, 364 N.E.2d 224, 227-28 (1977) (per curiam) (rejecting argument that Ohio capital punishment statute is unconstitutional by denial of right to jury of peers). Justice Rehnquist, in his capacity as Circuit Justice, has indicated that the absence of jury input at the sentencing stage is constitu-

phases of the trial. The state death penalty statute, however, contains no enumerated mitigating circumstances reflecting mental disorder,<sup>100</sup> nor any provision for jury instructions beyond requiring the judge to describe the mitigating and aggravating circumstances that are enumerated and to ask the jury to balance those found relevant. Moreover, the prosecutor objects to the admission of the evidence claiming both that it is not relevant to any of the mitigating factors enumerated in the state death sentencing statute and that it is not relevant to *any* principle of mitigation. He further argues that even if the evidence is admitted, the instructions provided in the statute bind the judge and no additional instructions should be given; or, if an instruction must be given, it should focus the jury's attention on the mental disorder only as an *aggravating* factor.<sup>101</sup> The judge must decide whether a nonstatutory mitigating factor must be admitted, whether the mental disorder on which the defendant wishes to

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tional under *Proffitt*. *Richmond v. Arizona*, 98 S. Ct. 8, 9 (1977) (Rehnquist, Circuit Justice) (denying application for suspension of cert. and stay of execution). The entire Court will have an opportunity to clarify its position regarding jury sentencing. *See* Brief for Petitioner at 9, *Lockett v. Ohio*, 98 S. Ct. 261 (1977) (No. 76-6997) (listing as issue whether death penalty statute violates sixth amendment by denying capitally accused right of judgment by peers regarding mitigating factors).

100. Neither Texas nor Georgia enumerates specific mitigating factors in its statute. *See* *Jurek v. Texas*, 428 U.S. 262, 271-72 (1976) (plurality opinion) (statutory question concerning defendant's future behavior construed to require consideration of mitigating factors); *Gregg v. Georgia*, 428 U.S. 153, 164 (1976) (plurality opinion) (scope of mitigating factors and nonstatutory aggravating factors not delineated in statute). By contrast, the Florida statute does list mitigating factors, including circumstances related to the defendant's mental and emotional condition, his age, and his capacity to understand and control his behavior. *See* FLA. STAT. ANN. §§ 921.121(2)(b), (f), (g) (West Supp. 1976-1977). Nevertheless, this list does not exhaust all possible mitigating circumstances.

101. Of the three statutes held constitutional in the *July 2 Cases*, each provides only that the jury must be instructed to balance the mitigating and aggravating circumstances that it finds, FLA. STAT. ANN. §§ 921.141(2)(b),(c) (West Supp. 1976-1977), or to consider any mitigating circumstances that it finds, GA. CODE ANN. §§ 27-2503(b), 27-2534.1(b) (Supp. 1977), or to answer a dispositive question in light of the mitigating and aggravating circumstances presented, TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon Supp. 1976-1977). Although the Florida statute limits aggravating circumstances to those enumerated in the statute, in Georgia and Texas the prosecution can make whatever arguments on aggravation that the judge deems relevant to the sentencing decision. *Compare* *Proffitt v. Florida*, 428 U.S. 242, 249-50, 250 n.8 (1976) (plurality opinion) (Florida statute limits aggravating but not mitigating circumstances to those enumerated; aggravating circumstances listed relate to seriousness of crime and degree of premeditation) *with* *Jurek v. Texas*, 428 U.S. 262, 272-73 (1976) (plurality opinion) (in determining whether defendant a continuing threat to society, jury may consider defendant's age, degree of mental or emotional pressure, remorse, or prior criminal behavior) *and* *Gregg v. Georgia*, 428 U.S. 153, 164 (1976) (plurality opinion) (although jury must find one of 10 statutory aggravating circumstances to impose death penalty, any other nonstatutory aggravating circumstance may be raised).

introduce evidence qualifies as a mitigating factor, whether she is obligated to instruct the jury, and, if so, what the instruction should be.<sup>102</sup>

*Admissibility of Mitigatory Evidence.* In deciding whether allegedly mitigatory evidence must be admitted, the trial judge must determine whether the scope of mitigating circumstances the court may admit can be statutorily or judicially restricted to established categories.<sup>103</sup> Because the statutes in the *July 2 Cases* did not impose any statutory restriction on mitigating evidence and because no evidence allegedly relevant to sentencing was excluded,<sup>104</sup> the plurality did not reach this question. Nevertheless, these cases and their progeny strongly suggest that the Constitution itself prohibits

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102. The difficulty of these questions is exacerbated by the uniqueness of the capital sentencing hearing. Precedent from the guilt or innocence stage of the trial or from sentencing hearings not involving the death penalty is unlikely to be useful to a capital sentencing judge. See Crump, *Capital Murder in Texas*, 14 HOUS. L. REV. 531, 561 (1977). But see note 123 *infra*.

103. See Crump, *supra* note 102, at 561 (predicting that evidence admissibility issues will present most difficult questions for courts applying the *July 2 Cases* at sentencing hearings). Four Ohio cases, including two pending before the Supreme Court, illustrate one state's answer to the question raised in text. In the earliest, the Ohio Supreme Court found that the state's death penalty statute is constitutional even though it expressly limits mitigatory consideration to three listed exculpatory circumstances, and its listed circumstance related to mental disorder is too narrow to encompass a defendant with "dull normal" intelligence and sociopathic traits. *State v. Bayless*, 48 Ohio St. 2d 73, 83-87, 94-96, 357 N.E.2d 1035, 1045-46, 1049-51 (1976) (construing OHIO REV. CODE ANN. § 2929.02-.04 (Page Supp. 1976)). The court in fact exacerbated the narrowness of the mental disorder circumstance by limiting its availability to defendants who can prove they suffer from a recognized psychosis or a significantly impaired intelligence. *Id.* at 94-96, 357 N.E.2d at 1049-51.

Drawing extensively on *Bayless*, the Ohio high court subsequently held that a 17 year-old offender was not sufficiently impaired mentally to qualify under the statute's mentality-based mitigating circumstance despite his tender age and behavioral retardation. *State v. Bell*, 48 Ohio St. 2d 270, 282-83, 358 N.E.2d 556, 563-65, *cert. granted*, 97 S. Ct. 2971 (1977) (No. 76-6513). The court felt that the statute's allowance for evidence of the "history, character and condition of the offender" so long as it relates to one of the three enumerated circumstances was broad enough to encompass all important mitigating factors. 48 Ohio St. 2d at 281, 358 N.E.2d at 564 (construing OHIO REV. CODE ANN. § 2924.04(B) (Page Supp. 1976)).

In perhaps the most troubling case, the court dismissed a drop in I.Q. scores from 75 (dull-normal) to 61 in 1966 and to 54 (moderate retardation) in 1968 and found no evidence of mental defect sufficient to qualify under the relevant statutory circumstance. The court's conclusion relied on a state psychiatrist's testimony linking the dropping scores to the defendant's uncooperativeness. *State v. Royster*, 48 Ohio St. 2d 381, 388-90, 358 N.E.2d 616, 622 (1976).

Most recently, the Ohio Supreme Court persisted in the view that a woman of dull-normal intelligence, in this case accompanied by behavioral characteristics of retardation, may not avail herself of the statute's exculpatory circumstance relating to mental disorder and defect. *State v. Lockett*, 49 Ohio St. 2d 48, 66-67, 358 N.E.2d 1062, 1074 (1976), *cert. granted*, 98 S. Ct. 261 (1977) (No. 76-6997).

104. See notes 74, 84-85 *supra* and accompanying text.

any restrictions on jury consideration of relevant mitigatory evidence.<sup>105</sup> Accordingly, a statute that attempts to enumerate exclusive mitigatory factors and thus that bars consideration of any other possibly relevant factors must be unconstitutional because it fails to treat persons convicted of a designated crime as "uniquely individual human beings."<sup>106</sup> Any statute that authorizes the execution of one convicted murderer without considering his peculiar frailties is no less unconstitutional than a statute that authorizes execution of all convicted murders without recognizing theirs.<sup>107</sup>

Because it is most unlikely that any statute could list all possible mitigating factors and because no degree of statutory particularization will suffice for constitutionality if the statute fails to anticipate a specific defendant or his crime, statutory enumeration alone can never meet the individualization requirement of the human dignity prong of the eighth amendment.<sup>108</sup> There must be some provision for consideration of mitigating factors beyond those identified in the statute, as in all three statutes validated by the Court. Thus, the standard of admissibility cannot be more narrowly drawn than the standard of relevance under the eighth amendment. When the statute

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105. See, e.g., *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 637 (1976) (per curiam) (essential that all information relevant to capital sentencing be considered); *Jurek v. Texas*, 428 U.S. 262, 271 (1976) (plurality opinion) (jury must consider all relevant factors before eighth amendment permits capital punishment); *Proffitt v. Florida*, 428 U.S. 242, 250 n.8 (1976) (plurality opinion) (noting absence of limiting language introducing list of mitigating factors); *Commonwealth v. Moody*, 22 CRIM. L. REP. (BNA) 2249, 2250 (Pa. Sup. Ct. Nov. 30, 1977) (*July 2 Cases* mandate that constitutional statute must delineate specific aggravating circumstances and impose no limitation on mitigating evidence relevant to defendant's character and record); cf. *Messer v. State*, 330 So. 2d 137, 142 (Fla. 1976) (Florida statute requires that judge exercise broad latitude in admitting evidence during sentencing; death sentence reversed for refusal to admit psychiatric testimony). The force of these precedents and the strength of the plurality's commitment to individualization overcomes any implications in the dictum of *Gregg* that state legislatures are the definers of mitigating factors. *Gregg v. Georgia*, 428 U.S. 153, 192 (1976) (plurality opinion) (sufficient guidance derived from jury's hearing mitigating factors enumerated in statute by legislature).

106. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion); see *Commonwealth v. Moody*, 22 CRIM. L. REP. (BNA) 2249, 2249-50 (Pa. Sup. Ct. Nov. 30, 1977) (statute that limits mitigating circumstances to those enumerated unconstitutional); Black, *Death Penalty Now*, 51 TUL. L. REV. 429, 438 (1977) (*July 2 Cases* considered access to full range of mitigating circumstances essential to valid statute).

107. Cf. *Jurek v. Texas*, 428 U.S. 262, 271-72 (1976) (plurality opinion) (statute that restricts jury consideration to aggravating factors suffers from same defect as mandatory statute).

108. In *Gregg* the plurality noted that the Model Penal Code's list of aggravating and mitigating circumstances created general categories. *Gregg v. Georgia*, 428 U.S. 153, 193-94, 193 n.43 (1976) (plurality opinion) (quoting MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962)). It cited *McGautha* for the proposition that wise capital sentencing is not susceptible to application by a mechanical formula. *Id.* at 194 n.45 (quoting *McGautha v. California*, 402 U.S. 183, 285-86 (1971) (Brennan, J., dissenting)).

does not list the item sought to be admitted, the trial judge must look to the Constitution itself to flesh out the standard for determining mitigating factors.<sup>109</sup>

*Identification of Mitigating Factors.*

Because the hypothetical statute does not list mental disorder as a mitigating factor, the judge first must examine the *July 2 Cases* for some hint of how to identify mitigating factors. The opinions provide two guides: first, they list specific mitigating factors mentioned both in the statutes found constitutional and in other sources;<sup>110</sup> second, *Woodson* provides a brief generic definition of "compassionate or mitigating factors" as facets of the character and record of the individual or of the circumstances of the crime that stem from "the diverse frailties of humankind."<sup>111</sup>

The specific factors named in the *July 2 Cases* are the easiest source for determining whether a specific situation constitutes a mitigating circumstance relevant to the capital sentencing decision: if the situation fits into an enumerated category, it probably must be admitted. Thus, in the hypothetical case, much of the defendant's evidence of mental disorder may fall within the mitigating factors enumerated in the *July 2 Cases* and accordingly should be admitted.<sup>112</sup> On the other hand, a facile recitation of a specific

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109. See Crump, *supra* note 102, at 563-64 (information admissible at sentencing a constitutional question and much that would be excluded under ordinary rules of evidence must be admitted).

110. See, e.g., *Jurek v. Texas*, 428 U.S. at 272-73 (in deciding whether defendant likely to commit another crime, jury may consider age, prior conduct, and duress or mental or emotional pressure at time of crime); *Proffitt v. Florida*, 428 U.S. at 248 n.6 (list of factors in Florida statute); *Gregg v. Georgia*, 428 U.S. at 193 n.44 (list of factors in Model Penal Code).

Moreover, when the Supreme Court recognizes a factor as mitigatory, it establishes an arguably sufficient basis for the subsequent introduction of all evidence relating to that factor. See *Ex parte Hammond*, 540 S.W.2d 328, 331 n.2 (Tex. Crim. App. 1976) (relying on hypothetical mitigating situation discussed in *Jurek*, involving battered wife who hires assassin to murder husband after years of beatings, to support conclusion in case with remarkably similar facts that defendant could not be sentenced to death; judgment denying bail reversed). Hence, in addition to its mention of the factors recognized in Texas and Florida and by the Model Penal Code, the plurality's discussion of two hypothetical mitigating circumstances seems significant. See *Jurek v. Texas*, 428 U.S. at 272 n.7 (discussing situation mentioned in *Hammond*); *Gregg v. Georgia*, 428 U.S. at 197 (defendant who cooperates with police).

111. 428 U.S. at 304.

112. The Model Penal Code as quoted in *Gregg* lists such circumstances as a murder committed while the defendant was under the influence of extreme mental or emotional disturbance, or a murder in which the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. 428 U.S. at 193 n.44 (quoting MODEL PENAL CODE §§ 210.6(4)(b), 210.6(4)(g) (Proposed Official Draft 1962)).

category named in the cases to justify classification of a similar circumstance as mitigating masks the lack of any normative basis for the analogy and only temporarily avoids the need to articulate a functional definition.

Moreover, the factors listed in the *July 2 Cases* are not exhaustive. For example, although broad enough to encompass most evidence of mental instability, the stated categories do not include a criminal who exhibits a documented mental condition, not uncommon among murderers, that leads him to murder because he realizes the heinous and immoral nature of the act will induce society to impose its most severe punishment.<sup>113</sup> Despite clear premeditation, such a defendant may argue that mitigation is appropriate because society should not participate in suicide<sup>114</sup> or because his execution will not deter similar crimes but may, in fact, incite them.<sup>115</sup> Thus, despite the failure of this evidence to fit neatly into nonexclusive categories listed in the *July 2 Cases*,<sup>116</sup> it should not be excluded. Nor can this lack of comprehensiveness be solved by liberally interpreting the stated categories. That approach eliminates any semblance of guidance and leaves administration of the death penalty open to the standardless caprice condemned by *Furman*.<sup>117</sup>

Instead, the judge should turn her attention to the general definition of mitigating circumstances in *Woodson* and should give it

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113. See Ehrmann, *For Whom the Chair Waits*, FED. PROBATION, March, 1962, at 14, 19-20 (Mar. 1962) (discussing Massachusetts case in which defendant, who had made several suicide attempts, pleaded with jury for death in electric chair, thanked judge after hearing death sentence, and refused to request commutation; defendant hanged himself in cell two days before Governor recommended commutation); Stotzky, *supra* note 68, at 842 n.1 (discussing execution of Gary Gilmore and its impact on persons with death wish); West, *Psychiatric Reflections on the Death Penalty*, 45 AM. J. ORTHOPSYCHIATRY 689, 695-97 (1975) (discussing various cases and authorities); note 261 *infra*.

114. See N.Y. Times, Jan. 18, 1977, at 21, col. 1 (existence of capital punishment encourages commission of homicides by suicidal individuals).

115. See Stotzky, *supra* note 68 at 842 n.1 (case of Gary Gilmore may serve as incentive for persons contemplating suicide to commit violent crimes).

116. The plurality characterized the citation of factors as a general exposition to clarify the possibility of constructing a capital sentencing system that meets the *Furman* standards. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (plurality opinion).

117. Liberal construction of the statutory language is likely to occur frequently. For example, the comments to the Model Penal Code indicate that the "extreme mental or emotional disturbance" factor may mitigate only in a situation in which some brief, but explosive, mental or emotional state contributed to the crime, qualifying its deliberateness. MODEL PENAL CODE § 201.6(4), Comments at 70 (Tent. Draft No. 9, 1959); *id.* § 210.3 (Proposed Official Draft 1962), discussed in *Patterson v. New York*, 432 U.S. 197, 218-20 (1977) (Powell, J., dissenting). Nevertheless, in Florida, where the death sentencing statute was modeled on the Model Penal Code, this factor was found to exist in a case in which a long-standing mental disorder short of insanity contributed to a pattern of crime. See *Huckaby v. State*, 343 So. 2d 29, 33-34 (Fla. 1977) (*per curiam*) (father with brain abnormality raped and brutalized children over several years; death sentence reversed and remanded for life sentence because of overwhelming mitigating factor).

content derived from the factors that must be satisfied before death may ever be imposed constitutionally, that is, from the substantive aspects of the doctrinal framework implicit in the eighth amendment. An examination of the doctrinal superstructure as a whole and of public attitudes and penological justifications in particular<sup>118</sup> is a logically necessary step for the trial court to take in attempting to identify what information is mitigating. When the presentation of any complex and interrelated doctrine does not exhaustively discuss the full implications of one of its subparts, interpreting courts, as a matter of course, may give additional substance to the ambiguous subpart—in this instance the definition of mitigating factors in the individualization requirement—by seeking guidance from or at least consistency with the rest of the text. Moreover, beyond the dictates of interpretive symmetry, the eighth amendment itself requires consideration of mitigating factors that derive from the other, substantive components of its doctrinal superstructure. The procedural requirement that a court must consider individualized mitigating factors is inseparable from the substantive requirements of the “evolving standards of decency” doctrine. The *July 2 Cases* held that capital punishment may be imposed constitutionally only because it comports with public attitudes and because it might serve penological justifications. Because an execution that offends public attitudes or that does not serve any valid purpose is unconstitutional, compliance with the eighth amendment requires that a capital sentencing system permit the introduction of any evidence tending to prove that punishing the defendant with death would offend public attitudes or would fail to serve the recognized penological justifications of retribution and deterrence.<sup>119</sup> Even if the individualization subpart of the test is viewed as a procedural requirement independent of the substantive requirements of the eighth amendment,<sup>120</sup> each state is required by

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118. The third substantive element of the test focuses on the proportionality of the punishment to the crime. For the reasons discussed in note 53 *supra*, this element will not be explored further here.

119. *Accord, The Supreme Court, 1975 Term, supra* note 25, at 75 n.78 (death penalty in general cannot be justified by retribution if morally indistinguishable defendants are executed; neither can it be justified by deterrence if particular case does not focus on deterrence served by that execution); *cf. Gardner v. Florida*, 430 U.S. 349, 360 (1977) (enormity of death penalty requires vigilance to ensure preservation of constitutional rights in every case; confidential presentence report must be disclosed); *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976) (plurality opinion) (individualized capital sentencing is progressive and humanizing development arising out of human dignity underlying eighth amendment and enables sentencing authority to arrive at “just and appropriate sentence”).

120. This view was adopted in *The Supreme Court, 1975 Term, supra* note 25, at 64-65. Such an approach is the result of a failure to note the confluence of *Furman's* prohibition of arbitrariness with the human dignity branch of evolving standards of decency. *See* notes 48-49 *supra* and accompanying text.

the plurality to adopt the individualization procedure as part of its death sentencing system. Moreover, as the preceding discussion demonstrates, the system the state adopts—and thus the state's choice of what information to include in its individualization process—is constitutional only if it adheres to the entire “evolving standards of decency” doctrine.<sup>121</sup>

*Right to an Instruction.* Once the defendant establishes that proffered evidence is relevant to the issue of mitigation as defined in the *July 2 Cases*, the eighth amendment individualization requirement mandates its admittance. Merely exposing the jury to relevant individualized information does not ensure, however, that the sentence imposed will comport with the eighth amendment.<sup>122</sup> The standards used by the judge to determine whether evidence is relevant to mitigation and by the legislature in drafting the statute must also be communicated to the jury. The guidance side of “guided individualization” thus raises the usual right of a defendant to demand a trial instruction on his theory of the case<sup>123</sup> to the level of a

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121. See note 25 *supra*; text accompanying notes 44, 103-09 *supra*.

122. See *Gregg v. Georgia*, 428 U.S. 153, 195-95 (1976) (plurality opinion) (because jury inexperienced in sentencing, constitutional requirement best met by statute providing bifurcated proceeding at which jury presented relevant information and standards to guide its use of that information).

123. That a defendant is entitled to a requested instruction on any defense for which there is a foundation in law or fact is well established. C. WRIGHT & C. MCCORMICK, *FEDERAL PRACTICE AND PROCEDURE: CRIMINAL* §§ 485, 495 (1969); see, e.g., *United States v. Grimes*, 413 F.2d 1376, 1378 (7th Cir. 1969) (defendant entitled to instruction on any theory reasonably supported in law although evidence weak, inconsistent or of doubtful credibility); *Strauss v. United States*, 376 F.2d 416, 418-19 (5th Cir. 1967) (judgment reversed because of judge's refusal to instruct on substantive defense to tax evasion); *People v. Slocum*, 52 Cal. App. 3d 867, 889, 125 Cal. Rptr. 442, 445 (1975) (judge must instruct on any material evidence regardless of veracity). Instructions are required not only to ensure that the jury consider the theory for which the defendant introduced the evidence, but also as a prophylactic measure to avert the potential for prejudice or improper use inherent in certain types of evidence. See C. WRIGHT & C. MCCORMICK § 492 (limiting use of character evidence); *id.* § 496 (limiting use of impeaching evidence). Thus, the defendant customarily has a right to a limiting instruction—a right he may exercise to demand an instruction that prohibits the jury from drawing improper inferences from the mitigating evidence.

Moreover, the trial court's discretion to decide when evidence is sufficiently prejudicial to require a prophylactic instruction is severely curtailed when prejudicial evidence will play such a crucial role in the case that the normal option of exclusion is not available. See *United States v. Telfaire*, 469 F.2d 552, 555 (D.C. Cir. 1972) (identification evidence is generally highly probative; instruction required to prevent it from prejudicing jury); cf. *Bruno v. United States*, 308 U.S. 287 (1939) (federal defendant has right to instruction that his failure to testify not indicative of guilt); FED. R. EVID. 403, Advisory Comm. Note (instruction important alternative to exclusion of evidence). This basis for the limiting-instruction rule bolsters the hypothetical defendant's right to an instruction that the jury ignore any prejudicial aspects of his evidence of mental disorder. See note 275 *infra*.

constitutional imperative for mitigatory instructions in the sentencing phase.<sup>124</sup> That imperative draws additional strength from the analogous but broader constitutional rule that a trial court must charge the jury on any substantive constitutional defense raised by a criminal defendant's evidence.<sup>125</sup> To satisfy all of these rules, the

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Most of the body of law establishing the right to an instruction evolved in the guilt or innocence stage of the trial. See FED. R. CRIM. P. 30 (right to file instruction requests at close of evidence). The *July 2 Cases* make clear, however, that this right is equally viable in the sentencing portion of the trial. See *Gregg v. Georgia*, 428 U.S. 153, 193 (1976) (plurality opinion) (practice of providing jury with guidance by instruction entrenched in legal system; no reason to alter in sentencing context). One type of sentencing hearing that has been the subject of some judicial and scholarly discussion is the treatment of persons who have become insane while awaiting execution. See *Solesbee v. Balkan*, 339 U.S. 9 (1950) (constitutional to execute insane person). Some states have statutes prohibiting executions of the insane and establishing special sentencing hearings to determine sanity. See generally Hazard & Louisell, *Death, the State and the Insane: Stay of Execution*, 9 U.C.L.A. L. REV. 386 (1962). At least one such statute that utilizes a jury as sentencing authority gives the defendant the right to instructions. OKLA. STAT. ANN. tit. 22, § 1165 (West 1958).

124. A death penalty system cannot fulfill *Furman's* basic requirement unless it replaces arbitrary jury discretion with objective standards to guide and regularize the process. *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (plurality opinion). The opinions in the *July 2 Cases* varied in the degree of emphasis they placed on this guidance requirement. See notes 80-91 *supra* and accompanying text. Compare *Woodson v. North Carolina*, 428 U.S. at 302-03 (separate importance of guidance emphasized) with *Jurek v. Texas*, 428 U.S. at 274-76 (arbitrariness eliminated by presenting all relevant information to jury). Nevertheless, having established that a defendant must have the right to bring to the jury's attention whatever factors might bear on mitigating his punishment, the Court cannot be lax in formulating its instruction requirement. Once that evidence is before the jury, the eighth amendment mandates guidance in how to evaluate its relevance to the sentencing decision.

125. See, e.g., *In re Winship*, 397 U.S. 358, 361-64 (1970) (due process right to instruction that reasonable doubt on part of jury prohibits conviction); *John Bad Elk v. United States*, 177 U.S. 529, 530 (1900) (right to instruction that illegality of arrest a constitutional defense to charge of resisting arrest, if resistance reasonable); *United States v. Waskow*, 519 F.2d 1345, 1347 (8th Cir. 1972) (dicta suggesting right to instruction on due process defense that extremely offensive police activity led defendant to commit crime); *Commonwealth v. Armao*, 446 Pa. 325, 286 A.2d 626 (1972) (right to instruction that truth a constitutional defense to libel). In other areas of the law in which jury confusion could deprive an individual of a constitutional right, the absence of an instruction constitutes reversible error. See, e.g., *Bachellar v. Maryland*, 397 U.S. 564, 569, 571 (1970) (conviction for disturbing peace during demonstration protesting Vietnam War reversed because jury instructions never clarified what legal weight to give to evidence; possible that conviction based on espousal of unpopular ideas); *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (conviction for advocating violence during Ku Klux Klan rally reversed because neither syndicalism statute nor instructions to jury refined statutory definitions to assure that defendants not convicted of mere advocacy); *Smith v. California*, 361 U.S. 147, 155 (1959) (conviction for selling obscene literature reversed because no instruction that defendant's lack of knowledge constitutionally prevents conviction); *People v. Vann*, 12 Cal. 3d 220, 227-28, 524 P.2d 824, 829, 114 Cal. Rptr. 352, 357 (1974) (inadvertant and unchallenged omission of crucial instruction on proof beyond a reasonable doubt amounts to reversible error). Similarly, the refusal to give an instruction that prevents imposition of the death penalty in a manner that violates the Constitution must also require reversal.

mitigation instruction must be framed to guide the jury toward a sentence that is morally acceptable to society and that serves recognized penological justifications. Any reference to instructions in the sentencing statute cannot limit the defendant's right; nor can the alleged relevance of the evidence to an enumerated aggravating factor<sup>126</sup> alter the constitutional requirement of an instruction for its mitigatory potential.<sup>127</sup>

In the *July 2 Cases*, the Court chose not to heed Justice Harlan's warning that guidelines for death sentencing can be no more than "meaningless 'boiler-plate.'" <sup>128</sup> Nor did it succumb to Professor Kalven's dilemma and abolish the death penalty.<sup>129</sup> Instead, it concluded that through guided individualization legislatures can write and courts and juries can apply capital statutes that conform to the eighth amendment.<sup>130</sup> In overseeing this experiment in guided,

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126. At least one court has interpreted the *July 2 Cases* as holding that, although mitigating factors may not be restricted to a specific list, aggravating factors that will justify imposition of the death penalty must be clearly defined. See *Commonwealth v. Moody*, 22 CRIM. L. REP. (BNA) 2249, 2250 (Pa. Sup. Ct. Nov. 30, 1977) (noting that all three statutes held constitutional limited imposition of death penalty to murder accompanied by specified aggravating circumstances; Pennsylvania statute constitutional in that regard). Thus it might be argued that the prosecutor may successfully seek an instruction on the aggravating potential of evidence offered in mitigation only if it is relevant to an enumerated factor. Moreover, if the prosecution introduces evidence in support of some enumerated aggravating factor, the defendant may request an instruction on the mitigating potential of the same evidence. If the evidence is arguably relevant to the legal standard for mitigation inherent in the eighth amendment, the mitigating instruction must also be given. Indeed, the strong possibility of prejudice when the defendant's mental disorder is established and the judge accedes to the prosecutor's request for an instruction on the defendant's continuing danger to the community can be overcome only by an instruction informing the jury of its mitigatory potential. The defendant's request for an instruction may be refused only if it has no support in the evidence, or is incorrect as a matter of law. See F. WHARTON, IV CRIMINAL PROCEDURE § 538 (12th ed. C. Torcia 1976); note 275 *infra*.

127. The establishment of mitigatory standards to guide the sentencing authorities' decisionmaking not only eliminates unconstitutionally arbitrary discretion but also facilitates appellate review of every aspect of the process.

All three of the sentencing systems held constitutional in the *July 2 Cases* were praised by the plurality for increasing the ability of appellate courts to review decisions made at the sentencing hearing. See *Jurek v. Texas*, 428 U.S. 262, 269-70, 276 (1976) (plurality opinion) (Texas expedited review process protects against wanton or freakish sentences); *Proffitt v. Florida*, 428 U.S. 242, 250-51 (1976) (plurality opinion) (Florida requirements of automatic review and written findings guarantee meaningful appellate review and ensure similar sentences in similar circumstances); *Gregg v. Georgia*, 428 U.S. 153, 203-06 (1976) (plurality opinion) (mandatory supreme court review ensures that sentence of death comports with eighth amendment and eliminates random or arbitrary imposition). The mandatory statutes failed to satisfy the requirements of *Furman* in part by their failure to make the process of death sentencing rationally reviewable. See *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (plurality opinion); note 192 *infra*.

128. See text accompanying notes 3-4, 21 *supra*.

129. See text accompanying notes 2-6 *supra*.

130. See text accompanying note 17 *supra*.

individualized sentencing, the Court placed primary reliance on the requirement that the death sentencing authority consider all circumstances in mitigation of the ultimate sanction. The foregoing analysis demonstrates, however, that the Court must go further. It can ensure that its experiment will succeed against the odds set by Justice Harlan and Professor Kalven only by insisting that the mitigation requirement be applied in conformity with the eighth amendment doctrine under which it upheld the death penalty in the abstract. Most importantly, the Court must insist on the consideration of all mitigating factors, as defined by statute, recognized indicators of public attitudes, and penological justifications. In addition, instructions must be afforded on all relevant theories of mitigation whenever the jury serves as sentencing authority. Finally, because it has interpreted the eighth amendment's prohibition of cruel and unusual punishment to require that the death sentencing authority *consider* mitigating factors and to establish a process for *identifying* and *applying* them, the Court itself must accept final responsibility for reviewing all of these steps to ensure constitutional application of the death sanction.<sup>131</sup>

131. By emphasizing the importance of standards and of appellate review, the Court seems to have accepted a major role in policing the administration of death sentencing systems under the dictates of the *July 2 Cases*. See note 127 *supra*. In carrying out its review function in decisions on the abstract constitutionality of the death penalty, the Court has varied the scope of judicial scrutiny depending upon the part of the doctrinal framework being applied. Inherent in public attitudes scrutiny is a degree of judicial deference to the decisions of democratically elected legislatures insofar as those decisions are one important indicator of public attitudes. See *Coker v. Georgia*, 97 S. Ct. 2861, 2868 (1977); *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (plurality opinion); Stotzky, *supra* note 68, at 849; Tao, *supra* note 91, at 350-51. Nonetheless, by accepting the responsibility for balancing competing indicia of public attitudes, the plurality held out the possibility of finding legislative views outweighed by other considerations. See *Woodson v. North Carolina*, 428 U.S. 280, 298-99 & n.35 (1976) (plurality opinion) (mandatory statutes adopted in misguided effort to comply with *Furman* not entitled to much weight as indicator of renewed social acceptance of mandatory sentences; jury resistance to mandatory sentences relied on as indicator of adverse public attitudes); note 39 *supra*. The plurality also indicated a willingness to defer to legislative findings concerning the effectiveness of capital punishment as a deterrent. See note 58 *supra* and accompanying text. Despite this reluctance to grapple with the deterrence question, the Justices have recognized that the human dignity element of the test generally involves issues that only the Court itself can resolve. See *Coker v. Georgia*, 97 S. Ct. at 2868 (public attitudes only half of eighth amendment question; to resolve other half, Court must use its own judgment); *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 644 n.1 (1977) (Rehnquist, J., dissenting) (holding of plurality in *July 2 Cases* demonstrates plurality itself to be final arbiter of human dignity prong).

The Court has not yet revealed whether it will use the same multifaceted scope of review in measuring the conformity of specific statutes and sentences against each aspect of the *July 2 Cases* doctrinal framework. Cf. *Gardner v. Florida*, 430 U.S. 349, 368-70 (1977) (Marshall, J., dissenting) (contrary to plurality's expectation in *Proffitt*, Florida Supreme Court review of individual sentence insufficient because it should have found two mitigating circumstances existed which outweighed aggravating circumstances; failure to reduce death penalty to life imprisonment indicates unconstitutionality of Florida statute despite *Proffitt*); *id.* at 361 n.12 (plurality opinion) (questions raised by Justice Marshall premature; case remanded on other grounds with expectation that Florida Supreme Court will adhere to *Proffitt*).

## II. DEVELOPING A SPECIFIC MITIGATORY THEORY: MENTAL DISORDER SHORT OF INSANITY

### MENTAL DISORDER IN THE CONTEXT OF THE DOCTRINAL FRAMEWORK

The identification of mitigating factors will play an important role in future death penalty litigation and legislation. Although the full range of mitigating factors that might someday be recognized is in doubt, certain broad classes of potentially mitigatory circumstances are readily apparent. The discussion now turns to one such class—mental disorder<sup>132</sup>—to illustrate the application of the individualization and guidance requirements discussed in the preceding sections.

The selection of mental disorder as a potentially mitigating factor in the preceding hypothetical situation was not arbitrary but was a product of the authors' guided discretion. Although mental disorder is recognized as a mitigating factor in some state death sentencing statutes,<sup>133</sup> many legislators, judges, and jurors may not immediately intuit its potential. Moreover, the high incidence of various mental disorders among capital offenders assures that the mitigatory problems associated with these afflictions must soon be resolved.<sup>134</sup>

This part of the article undertakes two tasks. First, it demonstrates that treatment of mental disorder as a mitigating circumstance is consistent with the doctrinal framework of the *July 2 Cases*. To this end, public attitudes toward the death penalty and retributive and deterrent penological justifications for capital punishment are examined, and tentative definitions of mental states that may qualify as mitigating circumstances within those parameters are outlined. Second, it derives from these definitions a four-factor scheme for analyzing the mitigatory potential of mental disorder and emphasizes the scheme's application to the specific requirements of jury instructions in death sentencing proceedings.

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132. Throughout this section the phrases "mental disorder" and "mental abnormality" are employed generically to denote all abnormal mental conditions, whether organic, environmentally induced, or illness-related.

133. See notes 158-59 *infra* and accompanying text.

134. See D. ABRAHAMSEN, *THE MURDERING MIND* (1973); D. LUNDE, *MURDER AND MADNESS* 83-105 (1975). Two cases raising these issues are now before the Supreme Court. See notes 26 & 103 *supra*.

## PUBLIC ATTITUDES

*Early History of the Law of Mitigation.*

In the *July 2 Cases*, "history and traditional usage" provided significant source material for the interpretation of the eighth amendment.<sup>135</sup> The inattention of early commentators to the role of mental abnormality as a mitigating factor in capital cases<sup>136</sup> and the limited data available for reconstructing that role,<sup>137</sup> however, restrict any historical analysis. Nonetheless, clear evidence indicates that, since the medieval period, Anglo-American law has accepted special treatment, and often has permitted mitigation, when a criminal is afflicted with a mental abnormality.

As early as the eleventh and twelfth centuries, English law treated mad "felons" with a leniency not accorded ordinary offenders.<sup>138</sup> When trial by petit jury became the usual method of determining guilt, mad offenders were subject to conviction, but could be declared mad to facilitate a grant of pardon or a reduction of punishment.<sup>139</sup> Bracton's thirteenth century commentary justified this mitigation of punished by his madness.<sup>140</sup> By the reign of Edward I, mitigation of

135. *Woodson v. North Carolina*, 428 U.S. at 288, 239-93 (history and traditional usage important measures of social values regarding mandatory death sentences); see *Gregg v. Georgia*, 428 U.S. at 173, 176-89 (history and precedent major considerations in determining whether capital punishment is per se unconstitutional). For a general delineation of the sources of public attitudes recognized in the *July 2 Cases*, see notes 35-39 *supra* and accompanying text.

136. See 1 N. WALKER, *CRIME AND INSANITY IN ENGLAND* 17-18, 26 (1968).

137. See E. POWERS, *CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS* 529 (1966) (court records provide inadequate information). The primitive state of the psychological profession before the twentieth century precludes inquiry into the early categorization of mentally disordered offenders beyond the general groupings of madmen and lunatics.

138. Madmen who committed serious offenses were spared from trial by ordeal because they were believed to be morally blameless. 1 N. WALKER, *supra* note 136, at 18. Instead, the madman's family was required to restrain him and to pay compensation to the victim. *Id.* at 26.

139. *Id.* at 26-27. Because juries and judges believed they lacked sufficient authority to interfere with the normal course of the law, only the King could mitigate the prescribed punishment by excusing the deranged "felon" from mandatory penalties. *Id.* at 24, 26; cf. 3 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 371 (3d ed. 1923) (the canon law imposed liability for all acts, unless the act itself clearly demonstrated absence of moral responsibility).

140. Henerici de Bracton excused children from punishment because they lacked the intent to commit a crime, but excused madmen from punishment because of the misfortune of their fate. 2 H. BRACTON, *ON THE LAWS AND CUSTOMS OF ENGLAND* 384 (P. Thorne trans. 1968). Bracton's views are premised on two different theories of justice: that justice exists in each individual as his moral conscience; and that God, as the source of all justice, will grant each person his just deserts. See *id.* at 23 (justice is disposition by God to each person according to merit and by will of just man to do right). Although arguably inconsistent with moral notions of responsibility and intent, the rise in England of the expiatory justification for mitigation based on mental disorder coincided with the development of the morally based requirement of intent for criminal liability. See 1 N. WALKER, *supra* note 136, at 27. Moreover, the expiatory view for a time became dominant and replaced earlier moralistic justifications for mitigation. See *id.* (mentioning the reappearance of expiatory view in writings of Fleta, Coke, and Hume); note 138 *supra*; notes 227-37 *infra* and accompanying text.

punishment for madmen had become commonplace.<sup>141</sup>

As England's criminal justice system formalized, the defendant's abnormal mental condition eventually became an absolute defense to criminal punishment—first in pardon proceedings and later in the initial determination of guilt.<sup>142</sup> Although the procedural form of applying differential treatment changed, and its theoretical justification shifted from the expiatory notion that the madman was punished by his madness to the moral and utilitarian views that the madman cannot be blamed or deterred,<sup>143</sup> the proposition of special treatment retained vitality through the seventeenth and eighteenth centuries in the writings of Coke,<sup>144</sup> Sir Matthew Hale,<sup>145</sup> and Blackstone.<sup>146</sup>

Unrestricted by the narrow application of the insanity defense in English courts,<sup>147</sup> the Scots, led by Sir George Mackenzie, sought a more rational procedure for according differential treatment. Mackenzie proposed that lesser forms of mental disorder that impaired the defendant's reason but did not warrant the absolute defense of insanity should moderate punishment proportionately.<sup>148</sup>

141. N. HURNARD, *THE KING'S PARDON FOR HOMICIDE BEFORE A.D. 1307* 159, 161 (1969). Insanity was not viewed as an excuse for crime, but deranged criminals were protected from punishment for felonious actions. *Id.* at 170; see 3 W. HOLDSWORTH, *supra* note 139, at 372 (by the reign of Edward I (1272-1307), infancy, lunacy, misadventure, and self-defense merited mitigation of punishment). By 1300, pardons were so common that pretrial release of accused madmen was a regular feature of the criminal justice system. N. HURNARD, *supra* at 161.

142. Holdsworth places the advent of the insanity defense during the reign of Edward III (1327-77). 3 W. HOLDSWORTH, *supra* note 139, at 372 & n.9; cf. KENNY'S *OUTLINE OF CRIMINAL LAW* 75 n.5 (17th ed. 1958) (citing a 1313 case in which the acts of deranged offender found not to constitute a felony). Walker places the first clear acquittal on grounds of insanity at 1505. 1 N. WALKER, *supra* note 136, at 25-26.

143. See 1 N. WALKER, *supra* note 136, at 247. Adherents of the utilitarian and moral views differed on the justification for special treatment of the mad offender. The former felt that deterrence was inapposite; the latter believed that the madman was guiltless. Compare 3 E. COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 6 (E. Brooke & R. Brooke ed. 1797) (execution of mad offenders cannot deter others) with 4 W. BLACKSTONE, *COMMENTARIES* \*24 (madmen suffer defective or vitiated understanding, which excuses them from guilt).

144. See 3 E. COKE, *supra* note 143, at 6.

145. See 1 M. HALE, *HISTORIA PLACITORUM CORONAE* \*30 (total alienation of the mind, or perfect madness, excuses the offender from guilt).

146. See 4 W. BLACKSTONE, *supra* note 143, at \*24. Although Blackstone stated the principle of law as *furiosus furore solum punitur* (a madman is punished by his madness alone), his explanation indicates that he did not adhere solely to an expiatory view. He also believed that the madman's impaired or defective understanding excused him from guilt. *Id.*

147. See KENNY'S *OUTLINE OF CRIMINAL LAW*, *supra* note 142, at 76 (as late as 1724, English courts refused to apply formal insanity defense unless offender's understanding and reason equivalent to that of brute or wild beast); 1 N. WALKER, *supra* note 136, at 38 (same).

148. 2 G. MACKENZIE, *WORKS* 58 (Edinburgh 1722) ("[S]ince the law grants a total immunity to such as are absolutely furious therefore it should by the rule of proportions lessen and moderate the punishment of such, as though they are not absolutely mad yet are Hypochondrick and Melancholy to such a degree, that it clouds their reason . . ."). Mackenzie's proposal was

In Scotland, Mackenzie's view developed into the practice of requiring the judge or jury to determine the defendant's state of mind after conviction so that the appropriate punishment would be imposed.<sup>149</sup> This practice gradually evolved into the more formal doctrine of "diminished capacity," which was incorporated into the jury charge on determination of guilt.<sup>150</sup> Although the English law did not incorporate Scotland's expeditious mitigatory procedure of diminished responsibility until 1957,<sup>151</sup> Mackenzie's proposal was avidly discussed.<sup>152</sup> And even so ardent a supporter of capital punishment as Sir James Stephen admitted that "the ends of justice" often required judicial discretion to reduce sentences on the basis of mental disorder.<sup>153</sup>

Similarly, in American law strong sentiment existed for mitigated punishment when defendants suffered from mental disorders that did not constitute legal insanity. In the colonial period, the criminal law in practice accepted milder forms of derangement as mitigatory factors.<sup>154</sup> By the turn of the twentieth century, moreover, several state

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premised on the Roman expiatory view that the madman was punished by his madness. See 1 N. WALKER, *supra* note 136, at 139-40. Thus, Mackenzie reasoned that offenders suffering from less severe derangements should be excused from punishment in proportion to the suffering that resulted from their mental condition. *Id.*

149. See A. ALISON, *PRINCIPLES OF THE CRIMINAL LAW OF SCOTLAND* 652 (Edinburgh 1832) (a defendant completely deprived of reason will be excused from all punishment; defendant suffering from a mixture of guilt and madness should receive recommendation for royal mercy); 1 B. HUME, *COMMENTARIES ON THE LAW OF SCOTLAND RESPECTING THE DESCRIPTION AND PUNISHMENT OF CRIMES* ch. 1 (Edinburgh 1797) (by eighteenth century, courts mitigated punishment sua sponte without requiring application for royal pardon); 1 N. WALKER, *supra* note 136, at 140-42 (sentencing for crimes for which courts could control severity of punishment could be reduced without resort to pardon process).

150. See *H.M. Advocate v. Dingwall*, 5 Irvine 466, 479 (1867) (jury could return verdict on murder charge or could find culpable homicide only if defendant's mental state warranted it); 1 N. WALKER, *supra* note 136, at 144-45 (diminished capacity defense first applied in 1844; unclear whether doctrine applied to mitigation of punishment, to reduction of offense, or to both). See generally notes 244-46 *infra* and accompanying text.

151. See The Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 2 (person suffering from abnormality of mind that impairs mental responsibility for acts shall not be convicted of murder).

152. See 1 N. WALKER, *supra* note 136, at 147 (early twentieth century commissions studying reform of English criminal law discussed diminished responsibility as alternative to defense of insanity); cf. 8 W. HOLDSWORTH, *supra* note 139, at 441 (advances in medical science by 1923 require more merciful treatment of insane persons by the law).

153. 2 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 89 (1883) (citing case of woman who suffered epileptic fits that permanently impaired her powers though not constituting legal insanity).

154. See E. POWERS, *supra* note 137, at 529 (mentally disturbed offenders were allowed special allowances and dispensations in Massachusetts Bay Colony); H. RANKIN, *CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA* 113 n.60 (1965) (Virginia Council recommended pardon when madman was convicted).

supreme courts allowed introduction of evidence concerning the defendant's mental state in determining the grade of offense.<sup>155</sup>

*Contemporary Anglo-American Positive Law of Mitigation.* These historical antecedents help to explain why the contemporary positive law of the United States and many other countries recognizes mental disorder as a circumstance in mitigation of the death penalty. Several statutory reform commissions, most notably the American Law Institute in its Model Penal Code, suggest not only that a defendant's mental disorder should qualify as one item on statutory lists of mitigating factors, but that mental disorder should be considered in death penalty decisions even if other factors are ignored.<sup>156</sup> The position of these law reform commissions has received increasing acceptance among drafters of capital sentencing systems. Of the thirty-one American jurisdictions that have retained or redrafted death penalty statutes since the *July 2 Cases*,<sup>157</sup> twenty-four have explicitly listed mitigatory factors that must be considered by the sentencing authority, including some form of mental disorder.<sup>158</sup>

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155. See *Andersen v. State*, 43 Conn. 514, 526 (1876) (failure in murder trial to admit evidence of defendant's maniacal behavior for determining degree of crime held erroneous); *Hempton v. State*, 111 Wis. 127, 135, 85 N.W. 596, 598 (1901) (same). A jury charge in an 1873 Connecticut case permitted the jury to acquit a mentally disordered defendant if it found him incapable of fully controlling his actions. *State v. Richards*, 39 Conn. 591, 595 (1873).

156. See MODEL PENAL CODE § 210.6(4)(g) (Proposed Official Draft 1962) (including mental disease or defect impairing capacity to appreciate criminality of act in list of mitigatory circumstances); *id.* § 4.02(2) (Proposed Official Draft 1962) (special section specifying only evidence of mental disease or defect admissible to support reduction of death sentence); ROYAL COMMISSION ON CAPITAL PUNISHMENT REPORT 121-22 (1953) (special treatment of mentally defective offenders should be extended to capital cases; question whether to make such extension discretionary reserved).

157. See notes 158-59 *infra* and accompanying text (listing statutes currently in effect). In late 1977 the statutes of two jurisdictions were ruled unconstitutional by state supreme courts. See *State v. Duren*, 547 S.W.2d 476, 480 (Mo. 1977) (death sentence provision of MO. REV. STAT. §§ 5509.05, 550.009 (Supp. 1975) held unconstitutional); *Commonwealth v. Moody*, 22 CRIM. L. REP. (BNA) 2249, 2249 (Pa. Sup. Ct. Nov. 30, 1977) (18 PA. CONS. STAT. ANN. § 1311(d)(2) (Purdon Supp. 1977) held unconstitutional). Recently, the Maryland legislature enacted a new death penalty statute. 1978 Md. Laws ch. 3 (to be codified as MD. ANN. CODE art. 27, § 412).

158. 49 U.S.C. § 1473(c)(6) (Supp. V 1975); ALA. CODE tit. 13, § 11-7 (1975); ARIZ. REV. STAT. § 13-454 (1956 & Supp. 1977), transferred and renumbered as § 13-902 by 1977 Ariz. Sess. Laws, ch. 142, § 58; ARK. STAT. ANN. § 41-1304 (1977); 1977 Cal. Legis. Serv. ch. 316 (West), (amending CAL. PENAL CODE § 190.3 (West Supp. 1976)); COLO. REV. STAT. § 16-11-103(5) (Cum. Supp. 1976); CONN. GEN. STAT. ANN. § 532-462(f) (West Supp. 1978); FLA. STAT. ANN. § 921.141(4) (West Supp. 1976); ILL. ANN. STAT. ch. 38, § 9-1(c) (Smith-Hurd Supp. 1977); IND. CODE ANN. § 35-50-2-9(c) (Burns Cum. Supp. 1977); KY. REV. STAT. § 532.025(2)(b) (Interim Supp. 1977); LA. CODE CRIM. PRO. ANN. art. 905.5 (West Supp. 1977); 1978 Md. Laws ch.3 (to be codified as MD. ANN. CODE art. 27, § 413(G)); 1977 Mo. Laws Act 11, § 5.3 (amending MO. ANN. STAT. §§ 559 (Vernon Supp. 1975)); NEB. REV. STAT. § 29-2525(2) (1975); 1977 N.H. Laws ch. 440.2; N.C. GEN. STAT. § 15A-2000 (Cum. Supp. 1977); OHIO REV.

The remaining seven death penalty statutes all contain general provisions that permit the defendant to present evidence on any mitigating factor.<sup>159</sup> Moreover, the case law relevant to four of these seven statutes strongly suggests an amenability to consideration of mental disorder.<sup>160</sup> Thus, it seems apparent that modern American legislators invariably include this factor when they set out to identify mitigatory circumstances.

The law of England is also indicative of relevant public attitudes toward mitigation of the death penalty.<sup>161</sup> English statutory law identifies mental disorder as a medical rather than a legal problem and has substituted treatment for punishment in noncapital cases involving such offenders.<sup>162</sup> Moreover, even before the death penalty

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CODE ANN. § 2929.04(B) (Page, 1975); 1977 S.C. Acts, Act 177, § 1(c)(6), *amending* S.C. CODE § 16-52(c) (Supp. 1977); 1977 Tenn. Pub. Acts ch. 51; UTAH CODE ANN. § 76-3-207(d) (Supp. 1977); 1977 Va. Acts ch. 492; 1977 Wash. Legis. Serv. ch. 206, § 4(2) (West) (*amending* WASH. REV. CODE § 9A.32.045 (1974)); WYO. STAT. § 6.54.2(j) (Interim Supp. 1977). Most of these statutes adopt the Model Penal Code's approach, focusing on an impaired capacity to appreciate wrongfulness. *See, e.g.*, MODEL PENAL CODE § 210.6(4)(g) (Proposed Official Draft 1962); FLA. STAT. ANN. § 921.141(4) (West Supp. 1976); LA. CODE CRIM. PRO. ANN. art. 905.5 (West Supp. 1977); WYO. STAT. § 6.54.2(j) (Interim Supp. 1977). Ohio has adopted a different test. *See* OHIO REV. CODE ANN. § 2929.04(B)(3) (Page, 1975) (death penalty precluded when offense results primarily from offender's psychosis or mental deficiency); note 103 *supra*.

159. DEL. CODE tit. 2, § 4209(c) (Cum. Supp. 1977); GA. CODE ANN. § 27-2534.1(b) (Supp. 1977); 1977 Idaho Sess. Laws ch. 154, § 4; MISS. CODE ANN. § 97-3-21(2) (Supp. 1977); 1977 Nev. Stats., ch. 585, § 4(7); OKLA. STAT. tit. 21, § 701.10 (Supp. 1976); TEX. CODE CRIM. PRO. ANN. art. 37.071 (Vernon Supp. 1976-77).

160. In Texas, evidence that a defendant is "of a low order of mentality" has been admitted in mitigation of the death penalty. *See* Thomas v. State, 97 Tex. Crim. 432, 434, 262 S.W. 84, 85 (1924) (evidence of defendant's low mentality admitted in mitigation). Furthermore, a recent Texas case has held that temporary insanity caused by intoxication qualifies as a mitigating fact. Whitmore v. State, No. 52,325 (Tex. Crim. App. Oct. 13, 1976) (unpublished opinion) (interpreting TEX. CODE CRIM. PRO. ANN. art. 37.071 (Vernon Supp. 1976-77)). Similarly, Idaho and Oklahoma courts have considered a defendant's mental state and development in mitigation of the death sentence. *See* State v. Behler, 65 Idaho 464, 476, 146 P.2d 338, 343 (1921) (defendant's low intelligence requires reduction of death penalty to life imprisonment); Williams v. State, 205 P.2d 524, 547-48 (Okla. 1947) (life sentence imposed instead of death penalty due to defendant's intoxication and lack of education).

The law in Georgia is less clear. Georgia's statute permits consideration of "any mitigating circumstances . . . otherwise authorized by law." GA. CODE ANN. § 27-2534.1(b) (Supp. 1977). It seems likely that the provision will be construed to allow trial courts to consider mental disorder. In the only relevant case, Woods v. State, 214 Ga. 546, 105 S.E.2d 896 (1958), the Georgia Supreme Court found that consideration of weakmindedness was permissible, although the trial court was not bound by law to so instruct the jury. *Id.* at 546-47, 105 S.E.2d at 897.

161. The relevance of English materials to public attitudes is underscored by their use by the *Gregg* plurality. *See* Gregg v. Georgia, 428 U.S. 153, 176 (1976) (plurality opinion) (noting that death penalty has long history of acceptance both in United States and in England). *Cf. id.* at 184 n.30 (citing 1950 report of the Royal Commission on Capital Punishment to support discussion of penological justifications).

162. *See* The Mental Health Act, 1957, 7 & 8 Eliz. 2, c. 72, § 60 (court may authorize defendant's admission to mental hospital if offender has mental disorder). *See generally* 1 N. WALKER, CRIME AND PUNISHMENT IN BRITAIN 268-94 (2d rev. ed. 1968) (discussing judicial discretion to commit offenders).

was abolished<sup>163</sup> English statutes afforded a wide range of mental disorder defenses, virtually assuring that mental defectives and the mentally ill would not receive death sentences.<sup>164</sup> Most importantly, diminished responsibility, which under The Homicide Act of 1957<sup>165</sup> prevented conviction for capital murder if the defendant was "suffering from such abnormality of mind . . . as substantially impaired his mental responsibility for his acts . . .,"<sup>166</sup> provided a mitigatory theory similar to those recognized in mitigation by American death penalty statutes. Even if convicted of a capital crime, an English prisoner had two more chances to use mental disorder as a basis for avoiding execution. First, English commutation practices provided for regularized postsentence administrative consideration of mitigating circumstances, including mental disorder, as a basis for downgrading punishment to life imprisonment.<sup>167</sup> Second, under the Criminal Lunatics Act of 1884,<sup>168</sup> any prisoner who appeared mentally abnormal received a psychiatric examination prior to execution; if the psychiatrists found that the offender was *then* insane or was insane at the *time of the crime*, the sentence was commuted by the Home Secretary to imprisonment for life.<sup>169</sup>

The law of several other foreign countries also is instructive because it affords a picture of the "evolving standards of decency" that mark the progress of societies arguably at least as mature as our

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163. The Murder (Abolition of Death Penalty) Act, 1965, 13 & 14 Eliz. 2, c. 71, § 1 (made permanent by resolutions of both Houses of Parliament, Dec. 10 and 18, 1969).

164. See, e.g., The Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 2(1) (defendant cannot be convicted if suffering from mental abnormality that impairs mental responsibility); Trial of Lunatics Act, 1883, 46 & 47 Vict., c. 38, §§ 1-2 (providing for verdict of guilty but insane, and for special custody); Criminal Lunatics Act, 1800, 39 & 40 Geo. 3, c. 94, § 2 (indicted person found insane on arraignment cannot be tried), *repealed by* Criminal Procedure Act, 1964, 12 & 13 Eliz. 2, c. 84, § 1.

165. 5 & 6 Eliz. 2, c. 11.

166. *Id.* c. 11, § 2(1). See generally Dix, *Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility, and the Like*, 62 J. CRIM. L.C. & P.S. 313, 323 n.58 (1971); Wooten, *Diminished Responsibility: A Layman's View*, 76 L.Q. REV. 224 (1960).

167. ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 4 (1949-51) (Memorandum of the Home Office) (sometimes necessary in commutation cases to consider whether prisoner is unusually weakminded or emotionally unstable); see 1 N. WALKER, *supra* note 136, at 284-85 (prisoner's mental condition often is reason for invoking royal prerogative of interference with the law).

168. 47 & 48 Vict., c. 64.

169. ROYAL COMMISSION ON CAPITAL PUNISHMENT, *supra* note 167, at 3. The standards of the Home Office appear to have made commutation *mandatory* if the pre-execution investigation revealed mental disorder as a cause of the criminal act, but they made commutation *discretionary* if the same condition was present immediately after sentencing.

own.<sup>170</sup> Indeed, many European countries, as well as Japan, have matured to the extent that they have abolished the death penalty.<sup>171</sup> Their attitudes toward mitigation are nonetheless visible in their penal codes, each having general provisions reciting mitigating circumstances, including mental disorder, for use in *all* sentencing decisions.<sup>172</sup> Similarly, nations that continue to apply the death penalty are also under statutory mandate to consider mental disorder.<sup>173</sup>

*Contemporary Responses to Mitigation by Other Institutions.*

Legislative bodies are not the only institutions making sentencing decisions that reflect public attitudes; once the criminal justice system focuses on a particular individual, mitigating factors might be considered at several critical points. Therefore, the factors considered relevant by prosecutors, trial judges, juries, appellate courts, and executive clemency administrators when they exercise their discretion over capital sentencing should also be examined closely to determine whether the importance of mental disorder as a mitigating factor is reflected in contemporary public attitudes.<sup>174</sup>

170. See *Coker v. Georgia*, 97 S. Ct. 2861, 2867 n.10 (1977) (plurality opinion) (climate of international opinion is relevant in assessing public attitudes toward death penalty). *But cf.* *Furman v. Georgia*, 408 U.S. 238, 404 (1972) (Burger, C.J., dissenting) (European abolition trend noted, not followed). See generally H. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 175-76 (1954) (citing foreign statutes); Mueller & Le Poole, *Appellate Review of Legal but Excessive Sentences: A Comparative Study*, 21 VAND. L. REV. 411, 424-29 (1968) (reprinting foreign statutes).

171. See generally Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L.C. & P.S. 397, 398-404 (1965) (table of world data on capital punishment statutes).

172. See, e.g., Austrian Penal Acts of 1852 & 1945, ch. 4, § 46(a) (N. West & S. Shuman trans. 1963) (low intelligence and neglected upbringing considered mitigating factors); GERMAN DRAFT PENAL CODE § 60(2) (N. Ross trans. 1965) (excuse of reduced volition considered); CRIMINAL CODE OF JAPAN art. 39 (T. Blakemore trans. 1954) (as amended 1954) (mental derangement and weakmindedness considered); NORWEGIAN PENAL CODE OF 1902, § 56(1)(b) (H. Schjoldager trans. 1961) (court may reduce punishment below minimum or commute to milder form when act was committed during temporary reduction of consciousness not due to voluntary intoxication); PENAL CODE OF SWEDEN ch. 33, § 2 (T. Sellin trans. 1972) (mentally ill cannot be punished; in certain circumstances offender must surrender to special confinement).

173. See, e.g., GREEK PENAL CODE art. 79 (N. Colis trans. 1973) (character and level of development must be considered); PENAL CODE OF THE POLISH PEOPLE'S REPUBLIC art. 25 (1969) (W. Kenney & T. Sadowski trans. 1973) (person incapable of recognizing significance of act or controlling conduct because of mental deficiency, mental illness, or other mental disturbance may not be convicted).

174. In rejecting the argument that the opportunity for discretion existing at each critical stage in the criminal justice process was a fatal flaw inherent in any capital sentencing statute, the *July 2 Cases* plurality emphasized that the interjection of mercy at each critical stage was essential to a constitutional statute. See *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (plurality opinion). Thus, the plurality recognized the importance of discretion at each stage to ensure that public attitudes play a role in the sentencing decision.

The prosecutor's decision to charge is one of the offender's initial contacts with the formal court system and is vitally important as a threshold of the decision whether the death penalty is appropriate in a particular case.<sup>175</sup> Although few studies focus on the factors actually considered in making this decision,<sup>176</sup> those available indicate that mental disorder is an accepted, though not the most frequent, ameliorative influence on the prosecutor's charging decision.<sup>177</sup> Moreover, the President's Commission on Law Enforcement and the Administration of Justice concluded that a prosecutor should consider noncriminal disposition when criminal acts involve offenders who have emotional disorders short of legal insanity.<sup>178</sup> Similarly, the American Bar Association has endorsed the exercise of prosecutorial discretion with regard to the proportionality of the authorized punishment to the specific offender.<sup>179</sup>

Juries also apparently consider the defendant's mental condition in making the sentencing decision.<sup>180</sup> Unfortunately, as in the case of

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175. See generally K. DAVIS, *DISCRETIONARY JUSTICE* (1969); W. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* (1965); F. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* (1970).

176. See K. DAVIS, *supra* note 175, at 198 (inquiry into prosecutorial discretion long overdue). See generally Kaplan, *Prosecutorial Discretion—A Comment*, 60 NW. U.L. REV. 174 (1965).

177. See, e.g., F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL & G. STARKMAN, *CRIMINAL PROCEDURE* 487 (1974) (noting tendency of prosecuting authority to be more lenient when illness or mental problems not amounting to insanity involved); Note, *Discretion Exercised by Montana County Attorneys in Criminal Prosecutions*, 28 MONT. L. REV. 41, 49 (1966) (prosecutors attributed 31% of their decisions not to prosecute to consideration of best interests of the defendant; insanity or low mentality was third most frequently mentioned component in that category, accounting for four out of nineteen decisions not to prosecute); Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519, 529 (1969) (survey of prosecutors indicates that intelligence of defendant is fourth most important consideration in the charging decision, behind prior records, occupation, and age). See also A. WILCOX, *THE DECISION TO PROSECUTE* 87-88 (1972) (discussing two studies analyzing practice of English police and prosecutors to commit mentally disordered persons as alternative to prosecution).

178. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: THE COURTS* 5 (1967) [hereinafter cited as *TASK FORCE REPORT*]. The use of the term "emotional disorders" does not appear to reflect an intent to limit the types of mental disorders that a prosecutor should consider. See *id.* at 8. (factors relevant to determining whether to seek noncriminal disposition include offender's medical, psychiatric, family, or vocational difficulties). The Task Force recommended that when such difficulties are apparent a prosecutor should evaluate the viability of alternatives to criminal prosecution such as referral to an agency, alcoholic treatment program, or mental institution. *Id.*

179. ABA STANDARDS RELATING TO THE PROSECUTION AND THE DEFENSE FUNCTION § 3.9(b) (Approved Draft 1971) (factors that prosecutor may consider in exercising discretion include disproportion of authorized punishment to specific offense or offender).

180. The jury is an extremely important link in the chain leading to execution. Moreover, as the plurality in the *July 2 Cases* emphasized, it is uniquely well suited to serve as a reflection of public attitudes. *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (plurality opinion); see notes 44 & 99 *supra* and accompanying text.

prosecutorial discretion, little documentation of juror attitudes exists.<sup>181</sup> Available studies do indicate, however, that if given free reign to determine punishment, modern juries, like those of old England and Scotland,<sup>182</sup> are inclined to mitigate the verdict upon finding facts indicating reduced or diminished responsibility insufficient to constitute insanity.<sup>183</sup>

In many instances the determination of the sentence is left to the discretion of the trial judge.<sup>184</sup> Commentary and empirical evidence suggest that judges, like juries, should and do inquire into a defendant's mental condition, with a variety of results. For example, the judge may impose an extended term of imprisonment because the defendant's mental abnormality makes him dangerous,<sup>185</sup> use an

181. This lack of data is undoubtedly due to the limitations of any attempt to study attitudes in the jury room: judges have not been congenial to direct observation of juries at work, and experimental juries are inherently suspect. See Morris, Bozzetti, Rusk & Read, *Whither thou Goest? An Inquiry Into Jurors' Perceptions of the Consequences of a Successful Insanity Defense*, 14 SAN DIEGO L. REV. 1058, 1060-61 (1977) (definitive answers concerning attitudes and behavior of juries not possible from use of hypothetical juries); Schmidt, Nebraska Press Association: *An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 444-45 (1977) (because mystery essential to jury's function, entire legal system hostile to either direct observation or experimentation).

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

183. See H. KALVEN & H. ZEISEL, *supra* note 6, at 331-34 (discussion of actual cases in which jury swayed by evidence of diminished responsibility reached verdict of manslaughter despite strong evidence of first degree murder); R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 95-96 (1967) (scientific survey showed one-half of jurors who found defendant guilty favored commitment over imprisonment, indicating treatment preferred for legally responsible persons); Dix, *supra* note 166, at 323 n.58 (English study of operation of doctrine of diminished responsibility indicated jury impressed by previous history of mental disorder and relied on it in reducing grade of offense).

184. See TASK FORCE REPORT, *supra* note 178, at 26 (summarizing relative roles of judge and jury in sentencing process in United States); Levin, *Sentencing the Criminal Offender*, FED. PROBATION, March, 1949, at 3. The constitutionality of leaving death sentencing entirely in the trial judge's hands is still in doubt. See note 99 *supra*.

185. See COUNCIL OF JUDGES OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT § 5 (2d ed. 1972) (severe personality disorder indicating propensity toward criminal activity justifies long term commitment to protect public) [hereinafter cited as COUNCIL OF JUDGES]; MODEL PENAL CODE § 7.03 (Proposed Final Draft 1962) (judge may justify imposing extended term of imprisonment if he finds defendant to be dangerous, mentally abnormal person whose incarceration necessary to protect public). The effect of the dangerousness of the mentally disordered person on the decision whether to impose death is uncertain. Compare *Jurek v. Texas*, 428 U.S. 262, 269 (1976) (plurality opinion) (Texas statute treats likelihood that defendant will be dangerous as aggravating factor justifying death) with *Hamblin v. State*, 81 Neb. 148, 168, 115 N.W. 850, 857 (1908) (death sentence reduced to life imprisonment because evidence of defendant's diminished responsibility demonstrates he suffered enough; society protected by lifetime incarceration) and *The Supreme Court, 1975 Term*, *supra* note 25, at 72 (specific deterrence equally well served by life imprisonment without any possibility of parole).

indeterminate sentence to provide a sufficient period for treatment,<sup>186</sup> or even dismiss the criminal prosecution and commit the mentally disordered individual to a civil institution.<sup>187</sup> Provisions in the Model Penal Code suggest other possibilities. Thus, the Code not only makes specific provision for mitigation in death penalty cases,<sup>188</sup> but also permits—as a reason for withholding imprisonment—recognition of substantial mental grounds that excuse or justify a defendant's criminal conduct but are insufficient to establish a defense.<sup>189</sup> Other sources indicate that judges sometimes place mentally disordered offenders on probation in cases in which others would be incarcerated,<sup>190</sup> and often consider the disorder as mitigatory when some type of punishment is nonetheless deemed appropriate.<sup>191</sup>

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186. Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 480-83 (1961) (mental disorder used as aggravating factor to provide time for treatment and to decide readiness to return to society); see Robert Murray Woolland, 51 *Crim. App.* 65, 67 (1966) (indeterminate life sentence imposed in England out of mercy to permit defendant to be released early if mental condition improves). Although extended sentences may at first seem to contradict the concept of mitigation of the death penalty, on further reflection it is clear that they do not. Such sentences are justified by an isolation and treatment rationale which, if applied in capital situations, in fact would warrant mitigation and perhaps commitment to a special treatment facility.

187. MODEL PENAL CODE § 6.13 (Proposed Final Draft 1962). In so providing, the drafters of the Code codified a practice that is widespread among judges in the Anglo-American legal system. See, e.g., COUNCIL OF JUDGES, *supra* note 185, at 18-19 (American judges may order in-patient or out-patient care based on clinical reports or on judge's own observation); K. DEVLIN, *SENTENCING OFFENDERS IN MAGISTRATE'S COURTS* 50-51, 197-200 (1970) (English judges may impose detention in hospital as viable alternative); J. HOGARTH, *SENTENCING AS A HUMAN PROCESS* 84-85 (1971) (Canadian judges who perceive defendants as mentally ill are affected in making sentencing decision by belief in reformation).

188. See MODEL PENAL CODE § 210.6(1)(e) (Proposed Final Draft 1962) (death penalty may be excluded if defendant's physical or mental condition calls for leniency); *id.* at §§ 210.6(4)(b), (g), (h) (mitigating circumstances in death penalty provision include presence of mental or emotional disturbance, diminished responsibility, and age).

189. *Id.* § 701 (Proposed Final Draft 1962).

190. See R. DAWSON, *SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITION OF SENTENCE* 93 (1969) (discussing judicial reluctance to incarcerate mentally disordered persons, especially the feeble-minded, whose conditions are insufficiently acute to warrant civil commitment).

191. See K. DEVLIN, *supra* note 187, at 50-53 (responsibility of defendant relevant in plea for mitigation of sentence because it offers explanation for conduct); E. GREEN, *JUDICIAL ATTITUDES IN SENTENCING* 5-6 (1961) (criteria for sentencing include defendant's mental characteristics and whether sentence likely to have corrective effect); Levin, *supra* note 184, at 3-4 (full appreciation of the nature and significance of behavior constituting offense relevant to severity of sentence). Mental disorder is also frequently included in the presentence report to help the judge evaluate the crime. See COUNCIL OF JUDGES, *supra* note 185, at 18.

The determinate sentencing system recently adopted in California dramatically illustrates the importance of a mental disorder as a mitigating factor relevant to the trial judge's sentencing deliberation. Under the new system, each crime carries the possibility of three sentences. The judge must impose the middle of the three in severity, unless aggravating circumstances warrant the more severe alternative, or mitigating circumstances call for the less severe alternative. CAL.

The exercise of discretion tempered by mercy does not end with the imposition of sentence by the jury or trial judge; even before *Furman* some states provided for appellate review of capital sentencing decisions,<sup>192</sup> and mental disorder was frequently held to be a valid ground for mitigation.<sup>193</sup> Appellate decisions in Nebraska, a state that traditionally has afforded appellate judges unusually liberal review of death sentencing decisions,<sup>194</sup> illustrate the manner in which some

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PENAL CODE § 1170(b) (West Supp. 1977); see Washington Post, Dec. 12, 1977, § C, at 1, col. 5 (similar proposal for overhauling sentencing procedures in the District of Columbia). The California statute authorizes judicial rulemaking to identify aggravating and mitigating circumstances. Pursuant to that authority, Rule 423(b)(2) has been promulgated, making physical or mental disorder a mitigating circumstance. CAL. RULES COURT tit. 2, div. 1, Rule 423(b)(2).

192. See TASK FORCE REPORT, *supra* note 178, at 25 (trend is for states to open sentencing determination to appellate scrutiny); Burr, *Appellate Review As a Means of Controlling Criminal Sentencing Discretion—A Workable Alternative?* 3 U. PITT. L. REV. 1, 5-6 (1971) (although appellate review not often provided over sentences within statutory limits, eight states grant specific powers to reduce excessive sentences and six others have power to modify); 108 U. PA. L. REV. 434, 436-38 (1960) (discussing states that grant appellate review and scope of review provided). The constitutional requirement of appellate review found by the plurality in the *July 2 Cases* will lead to an even more dramatic increase in appellate review of sentencing when the death sentence is imposed. See *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976) (plurality opinion) (mandatory death sentence law grants standardless sentencing power to jury in form of verdict determination; inability of appellate courts to review arbitrariness of jury determinations contributes to unconstitutionality); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (plurality opinion) (same); *Jurek v. Texas*, 262, 276 (1976) (plurality opinion) (automatic judicial review guarantees that similar results follow from similar circumstances, minimizing risk of arbitrariness); *Proffitt v. Florida*, 428 U.S. 242, 250-53 (plurality opinion) (same); *Gregg v. Georgia*, 428 U.S. 153, 195, 204 (1976) (plurality opinion) (automatic appeal prevents arbitrary imposition of death penalty by determining whether arbitrary factors figured in sentence, whether sentence is disproportionate to similar cases, and whether evidence supports the determination of aggravating factors); note 127 *supra*. Since the *July 2 Cases*, the Court has emphasized the importance of appellate review. See *Gardner v. Florida*, 430 U.S. 349, 360-61 (1977) (plurality opinion) (appellate court must be able to review presentence report if used by trial judge in imposing death sentence or if sentencing procedure fails to satisfy *Furman*).

193. H. WEIHOFEN, *supra* note 170, at 210-11; see, e.g., *State v. Behler*, 65 Idaho 464, 474-76, 146 P.2d 338, 343-44 (1944) (defendant with pronounced subnormal mind should not be held fully accountable; sentence reduced); *State v. Hall*, 176 Neb. 295, 310, 125 N.W.2d 918, 927 (1964) (youthful, feeble-minded defendant easily led into homicide; sentence reduced from death to life imprisonment); *Commonwealth v. Green*, 396 Pa. 137, 150, 151 A.2d 241, 248 (1959) (sentence reduced from death to life imprisonment because sentencing court failed to look for mitigating circumstances in background of dull-normal defendant).

194. Since 1887, Nebraska statutes have imposed on the state supreme court the duty to reduce a sentence that is excessive in light of the evidence presented. 1887 Neb. Laws ch. 110, § 1 (current version at NEB. REV. STAT. § 29-2308 (1975)); cf. NEB. REV. STAT. §§ 29-2524 to 2525 (1975) (expedited supreme court review in capital cases). Because these statutes are remedial, they are liberally construed. See *Anderson v. State*, 26 Neb. 387, 392, 4 N.W. 951, 953 (1889) (defendant convicted of first degree murder without strong showing of premeditation; sentence reduced to life imprisonment without requiring new trial).

appellate tribunals have treated evidence of mental disorder.<sup>195</sup> As early as 1895, the Nebraska Supreme Court identified the mental condition of the person convicted as one of several mitigating factors to be considered by trial courts in fixing punishments.<sup>196</sup> In 1908, that court became the first appellate tribunal in this country to substitute life imprisonment for a death sentence solely because the defendant's physical and mental condition, while not constituting legal insanity,

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195. Other states have followed similar pre-*Furman* patterns. In Idaho, until the enactment of a mandatory death penalty in 1972, the sentencing authority was authorized by statute to consider evidence of mitigating circumstances. IDAHO CODE § 19-2515 (1947) (amended 1972). Mental disorder has justified the state supreme court's reduction of capital sentences. *See State v. Owen*, 73 Idaho 394, 404, 253 P.2d 203, 207 (1953) (testimony regarding defendant's background and environment erroneously excluded); *State v. Behler*, 65 Idaho 464, 476, 146 P.2d 338, 343 (1921) (defendant's low order of intelligence requires reduction to life imprisonment).

The supreme courts of Illinois and Oklahoma have also recognized the mitigatory potential of mental impairment in judicially imposed capital sentencing situations. *See People v. Walcher*, 42 Ill.2d 159, 166, 246 N.E.2d 256, 261 (1969) (defendant's demonstrated chronic alcoholism renders death sentence inappropriate); *People v. Hetherington*, 379 Ill. 71, 74, 39 N.E.2d 361, 362 (1942) (sentencing court may consider defendant's moral character, mentality, and motives); *Williams v. State*, 89 Okla. Crim. 95, 141, 205 P.2d 524, 547-48 (1949) (defendants' very limited education and intoxication may be considered in reducing death sentence); *cf. People v. Dukett*, 56 Ill. 2d 432, 452, 308 N.E.2d 580, 601 (1974) (armed robbery conviction; sentencing court may consider defendant's moral character, mentality, social environment, and subnormal tendencies).

The appellate courts of Iowa and Kentucky have indicated concern that the sentencing authority fully consider evidence of mental impairment. Nonetheless, the deferential level of review exercised in those courts has allowed death sentences to be sustained in cases in which such evidence has been presented. *See State v. Junkins*, 147 Iowa 588, 593, 126 N.W. 689, 690 (1910) (jury-imposed death sentence affirmed despite evidence of defendant's defective mental capacity); *Miller v. Commonwealth*, 200 Ky. 435, 440, 255 S.W. 96, 98 (1923) (jury-imposed death sentence affirmed despite evidence of defendant's history of mental illness).

Similarly, in Pennsylvania prior to *Furman*, the trial judge was required to consider proffered evidence of mental disorder, but if the evidence was admitted and the trial judge did not find it adequate to justify mitigation, the supreme court was reluctant to overturn a sentence of death. *Compare Commonwealth v. Green*, 396 Pa. 137, 148, 151 A.2d 241, 247 (1959) (vacating death sentence of 15-year-old with low I.Q. because record did not indicate that sentencing judges adequately considered age, intelligence, or other facts bearing on the understanding and judgment of the defendant) *and Commonwealth v. Irelan*, 341 Pa. 43, 47, 17 A.2d 897, 899 (1941) (imposition of death sentence for murder of infant an abuse of discretion in light of defendant mother's minimal intelligence) *and Commonwealth v. Stabinsky*, 313 Pa. 231, 237, 169 A. 439, 441 (1933) (dictum) (defendant entitled to have psychiatric evidence go to sentencing jury) *with Commonwealth v. Smith*, 405 Pa. 456, 459, 176 A.2d 619, 620 (1962) (dictum) (supreme court will sustain death penalty despite evidence that defendant moronic, psychopathic, unstable, or feeble-minded). *See also Commonwealth v. Howard*, 426 Pa. 305, 311, 231 A.2d 860, 868 (1967) (Roberts, J., dissenting) (abuse of discretion to impose death penalty despite serious mental disorder).

196. *See Tracey v. State*, 46 Neb. 361, 367, 64 N.W. 1069, 1070 (1895) (robbery conviction affirmed; trial judge may consider defendant's previous jail terms because defendant has right to introduce other mitigating evidence such as mental disorder).

evidenced reduced culpability at the time of the crime.<sup>197</sup> Although the Nebraska court has resisted holding that evidence of mental disorder is per se mitigatory, especially if the inference of abnormality must be drawn from the heinousness of the crime,<sup>198</sup> it has reduced death sentences to life imprisonment with some regularity since 1908.<sup>199</sup> The degree to which this line of cases mirrored public attitudes is demonstrated by the fact that in 1973 the Nebraska legislature expressly made mental disorder a mitigating factor to be considered by the sentencing authority.<sup>200</sup>

Unlike Nebraska, most states in the pre-*Furman* era did not permit substantive review of sentences on appeal.<sup>201</sup> Trial-level sentence determinations were generally overturned only when statutory limits were exceeded or when prescribed procedures were not followed.<sup>202</sup> Nevertheless, the appellate courts of several of those states have made consideration of mental disorder an essential aspect of the sentencing process by construing their statutes to require admission of such evidence because it is relevant to mitigation. For example, the New York and California statutes require consideration of mitigating circumstances,<sup>203</sup> and the highest courts of both states have

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197. *Hamblin v. State*, 81 Neb. 148, 168, 115 N.W. 850, 857 (1908) (jury found defendant guilty and sane at trial in which psychiatric experts for both sides testified concerning history of epileptic seizures; supreme court found no justification for death sentence in evidence presented).

198. See *McAvoy v. State*, 144 Neb. 827, 835-36, 15 N.W.2d 45, 49 (1944) (no reduction of sentence for brutal rape and murder of 16-year-old girl; legislature intended death to be imposed on abnormal persons when the crime is sufficiently heinous to warrant it).

199. See, e.g., *State v. Hall*, 176 Neb. 295, 310, 125 N.W.2d 918, 927 (1964) (feeble-minded defendant categorized as low-grade moron or high-grade imbecile disposed to follow lead of others; death sentence reduced to life imprisonment); *Cyderman v. State*, 101 Neb. 85, 91, 161 N.W. 1045, 1048 (1917) (18-year-old defendant previously committed by parents could not reliably regulate his conduct; death sentence reduced to life imprisonment); *Muzik v. State*, 99 Neb. 496, 501, 156 N.W. 1056, 1058 (1916) (defendant's total withdrawal from outside world caused grave doubts about his responsibility for murder of wife; death penalty reduced to life imprisonment).

200. 1973 Neb. Laws ch. 268, § 8 (codified at NEB. REV. STAT. § 29-2523(2)(c) (1975)).

201. See *Burr*, *supra* note 192, at 5 (few exceptions to general rule that appellate courts have little control over sentence).

202. See TASK FORCE REPORT, *supra* note 178, at 25 (in majority of jurisdictions sentencing solely within discretion of trial judge if statute complied with); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099, 1125-29 (1953) (summary of state court decisions regarding degree of jury input in sentencing decision, effect of jury silence on punishment issue, requirement of unanimity for death sentence, and right of appeal); 108 U. PA. L. REV. 434, 435-36 (1960) (generally appellate review limited to enforcing compliance with statute).

203. See CAL. PENAL CODE § 190.1 (West 1970); N.Y. PENAL LAW § 1045(3) (McKinney 1967).

interpreted those provisions to require the admission of evidence of a mental condition offered to show mitigation.<sup>204</sup>

Even without similar statutes, some higher courts in states where jury sentencing was immunized from substantive appellate review<sup>205</sup> insisted that trial judges permit the presentation of all relevant information in mitigation, including evidence of mental disorder.<sup>206</sup> The New Jersey Supreme Court, for example, reached this conclusion after agonizing over the question for several years. Initially, the court interpreted the sentencing statute so that defendants were able to influence jury deliberation on the death penalty only if the evidence offered was relevant to the crime or to the attendant circumstances.<sup>207</sup> This interpretation was criticized,<sup>208</sup> and the court eventually reversed its position, recommending that proffered evidence of a defendant's

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204. See *Brubaker v. Dickson*, 310 F.2d 30, 38 (9th Cir. 1962) (under California law evidence of defendant's mental condition relevant to question of penalty as well as guilt); *People v. Bickley*, 57 Cal. 2d 788, 792-93, 372 P.2d 100, 102-03, 22 Cal. Rptr. 340, 342-43 (1962) (psychiatric testimony regarding defendant's sanity and susceptibility to rehabilitation relevant and admissible at sentencing); *People v. Mosely*, 20 N.Y.2d 64, 67, 228 N.E. 2d 765, 767, 281 N.Y.S.2d 762, 764 (1967) (refusal to admit evidence of defendant's mental condition at sentencing amounts to substantial error; death sentence imposed on convicted murderer of Kitty Genovese reduced to life imprisonment).

205. See, e.g., LA. REV. STAT. § 15.409 (West 1967) (current version at LA. CODE CRIM. PRO. ANN. art. 814(a)(1) (West Supp. 1977)), *invalidated in* *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (plurality opinion); N.J. STAT. ANN. § 2A:113-4 (West 1953), *invalidated in* *State v. Funicello*, 60 N.J. 60, 67, 286 A.2d 55, 59, *cert. denied*, 408 U.S. 942 (1972); TEX. STAT. ANN. ch. 16 art. 1257 (Vernon 1948) (repealed 1973).

206. See *Coleman v. United States*, 357 F.2d 563, 571, 573 (D.C. Cir. 1965) (en banc) ("sole discretion" construed as requiring judge to consider evidence offered in aggravation and mitigation and to base sentence upon it; death sentence overturned because trial judge failed to find defendant's retardation sufficient to justify mitigation), *State v. Henry*, 196 La. 218, 246, 198 So. 910, 919 (1940) (alternative holding) (proffered testimony of defendant's deprived childhood erroneously excluded); *Commonwealth v. McHoul*, 352 Mass. 544, 550 & n.6, 226 N.E.2d 556, 560 & n.6 (psychiatric testimony should be allowed beyond confines of legal insanity because juries may recommend against death sentence on grounds of impaired capacity); *Thomas v. State*, 97 Tex. Crim. 432, 434, 262 S.W. 84, 85 (1924) (proffered evidence of defendant's low mentality and lack of schooling admitted in mitigation); *State v. Brown*, 60 Wyo. 379, 397, 151 P.2d 950, 955-56 (1944) (knowledge of defendant's mental condition and age necessary for intelligent jury verdict).

207. See *State v. Wise*, 19 N.J. 59, 106-07, 115 A.2d 62, 87 (1955) (evidence of defendant's addiction to narcotics properly excluded from jury consideration because it did not bear on guilt or innocence); *State v. Favorito*, 115 N.J.L. 197, 203, 178 A. 765, 768 (1935) (exclusion of testimony concerning defendant's early life not erroneous).

208. See *State v. White*, 27 N.J. 158, 187, 142 A.2d 65, 81 (1958) (Francis, J., concurring) (evidence of defendant's mental disorders should be considered in determining punishment); *State v. Wise*, 19 N.J. 59, 107-08, 115 A.2d 62, 87-88 (1955) (Heher, J., dissenting) (jury should consider all evidence to determine whether capital punishment in these circumstances serves the interests of justice).

deprived childhood<sup>209</sup> and mental disorder<sup>210</sup> be admitted for sentencing purposes. The supreme courts of only two other states have explicitly refused to admit evidence of mental disorder in mitigation,<sup>211</sup> and no court has done so since 1944. Thus, even before *Furman*, appellate tribunals in a substantial number of states would have endorsed the conclusion of one eminent jurist that evidence of an offender's mental condition is so inseparable from a sentencing disposition and so important to justice for both the defendant and society that the legislature could not have intended to bar it.<sup>212</sup>

The factors weighed by an executive deciding whether to grant clemency are another strong indication of those considerations contemporary society as a whole believes relevant to sentencing. The endorsement of particular mitigating circumstances by a chief executive is especially forceful because it comes from an elected individual who is responsive to public opinion and whose decision to grant mercy is vital to the fair functioning of the criminal justice system.<sup>213</sup> Available sources indicate that mental disorder is a common and easily identified reason for invoking executive clemency.<sup>214</sup> Grounded in the English tradition that madmen are given

209. See *State v. Mount*, 30 N.J. 195, 219, 152 A.2d 343, 355 (1959) (alternative holding) (exclusion of evidence regarding defendant's deprived childhood improper).

210. See *State v. Sikora*, 44 N.J. 453, 472, 210 A.2d 193, 203 (1965) (evidence of personality defect regarding ability to premeditate murder admissible for sentencing purposes).

211. See *Foster v. State*, 222 Ind. 133, 136-37, 52 N.E.2d 358, 359 (1944) (refusing testimony regarding possible irresistible impulse caused by hormonal imbalance not error when insanity not plea); *Warner v. State*, 114 Ind. 137, 143, 16 N.E. 189, 192 (1888) (when insanity question properly before jury, mental capacity cannot be a mitigating factor in preventing punishment); *Woodruff v. State*, 164 Tenn. 530, 547, 51 S.W.2d 843, 848 (1932) (slightly subnormal intelligence is not a mitigating factor in intentional murder).

212. *State v. Lucas*, 30 N.J. 37, 87, 152 A.2d 50, 77 (1959) (Weintraub, C.J., concurring).

213. See *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (plurality opinion) (last opportunity for mercy provided by executive clemency critical to American criminal justice system and constitutionally mandated in federal system).

The scope of executive discretion in selecting reasons for granting clemency is unbounded. It is, therefore, quite significant when that decision is based on the mitigatory impact of a mental disorder. The executive decision carries a significance very different from, but no less important than, that accorded the decision of an appellate judge whose discretion to recognize mitigating factors is much more limited.

214. The exercise of executive clemency is usually a controversial intrusion into normal criminal process and frequently exposes the executive to bitter criticism. See W. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* 124 (1941) (reasons must be unassailable to avoid criticism); C. JENSEN, *THE PARDONING POWER IN THE AMERICAN STATES* 11 (1922) (criticism of administration of clemency power has led some states to establish advisory boards to guide its exercise). Hence, even if not required by statute, executives usually feel compelled to explain their announcement of clemency. W. HUMBERT, *supra* at 124. Because the pardon power is used so infrequently, the facts of each instance can be studied by commentators, and more complete analysis exists of the reasons for the grant of clemency than for the exercise of discretion at other

clemency by the King,<sup>215</sup> the recognition of mental disorder as a basis for clemency was firmly embedded in Anglo-American criminal justice by the eighteenth century.<sup>216</sup> In more recent times mental disorder has continued to form the basis of a significant number of clemency grants.<sup>217</sup> The depth of commitment to clemency on grounds of mental abnormality is revealed by its application to infamous defendants<sup>218</sup> and by the initiation in at least one state of regularized clemency investigation procedures that inquire into the mental accountability of the defendant.<sup>219</sup>

Historically and internationally, Anglo-American legal institutions and scholars have recognized that the penalty of death raises questions not asked about other punishments. Those same sources have also concluded that the mentally disordered wrongdoer presents problems not typical of the normal offender. Based on the former insight, institutional participants in many Anglo-American criminal justice systems traditionally have considered mitigating factors before undertaking procedures aimed at the ultimate sanction. And, drawing on the latter insight, those same people, in exercising discretion concerning whom to charge with what crime and how to punish those convicted, regularly have considered death an inappropriate penalty for many mentally afflicted offenders. Thus, these participants in the creation of "public attitudes" on capital punishment, while never anxious to put mentally disordered offenders "back on the streets," seem little more anxious to put them to death.

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stages in the criminal justice system. See *id.* at 124-33 (study of reasons underlying presidential grants of clemency); Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L.C. & P.S. 301 (1962) (analysis of factors affecting commutation); Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 191-92 (1964) (summary of executions and commutations in each state during early 1960's).

215. See 1 N. WALKER, *supra* note 136, at 41 (prior to sixteenth century, mad felons left to mercy of King).

216. See H. RANKIN, *CRIMINAL TRIAL PROSECUTIONS IN THE GENERAL COURT OF COLONIAL VIRGINIA* 113 n.60 (1965) (governing Council of colonial Virginia recommended pardons for murderers on insanity ground); 1 N. WALKER, *supra* note 136, at 196-200 (discussing English and Scottish practice of granting clemency when accused almost proved legal insanity).

217. See W. HUMBERT, *supra* note 214, at 124-33 (recommendations for clemency in federal system based on ill health of prisoner); Acer, *Executive Clemency*, 15 TEX. B.J. 603, 603-04 (1952) ("weak mind" of prisoner listed as reason to allow clemency); Wolfgang, Kelly & Nolde, *supra* note 214, at 310 (frequency of reasons offered by state authorities for commuting death sentences included 14.7% based on mental deficiency or disease, 4.9% based on poor family background, and 24.2% based on analogous factors such as intoxication and youth).

218. See Ehrmann, *supra* note 113, at 20-21 (describing specific situations in which sentences commuted upon evidence of mental disorders despite heinous nature of crimes); Note, *supra* note 214, at 166-68 & n.128 (evidence of mental instability short of insanity justifies commutation of sentence of brutal slayer).

219. See Note, *supra* note 214, at 169 (description of California procedure).

## PENOLOGICAL JUSTIFICATIONS

A constitutionally valid execution must not only be acceptable by contemporary values evidenced by the acts of legislators, prosecutors, jurors, judges, and executives; it also must serve a useful social purpose.<sup>220</sup> In *Gregg* the plurality concluded that the death penalty is imposed to serve two principal functions: retribution and deterrence.<sup>221</sup> The opinion referred to a wide array of social science literature and legal scholarship that analyzes these asserted penological justifications.<sup>222</sup> These sources should be examined to determine whether a particular aspect of the sentencing determination is penologically justified; however, the inquiry does not end with an assertion that many penologists, mental health professionals, and legal scholars have advocated the mitigation of punishment for mentally deranged offenders.<sup>223</sup> In contrast to the public attitudes analysis, a mere head count of those who advocate that mental disorder should be considered a mitigating factor, while persuasive, is not constitutionally conclusive in terms of the utility of the death penalty. Nevertheless, to the extent the advocates' conclusions are based on one of the two penological justifications for capital punishment identified by the Supreme Court, they will be relevant in determining whether imposing capital punishment on an individual with a mental disorder constitutes gratuitous infliction of pain in violation of the eighth amendment.

*Retribution.* The plurality in the *July 2 Cases* did not wholeheartedly embrace retribution as a critical justification for punishment; nevertheless, it conceded that retribution is a viable justification.<sup>224</sup> Although the plurality did not elaborate how punishment based on retribution should be administered, the *Gregg* opinion does refer to the work of Herbert Packer,<sup>225</sup> whose framework of retributive explanations for punishment provides a useful vehicle

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220. See *Gregg v. Georgia*, 428 U.S. 153, 182-83 (1976) (plurality opinion).

221. *Id.*

222. *Id.* at 182-87 & nn.29-32; see note 49 *supra* and accompanying text.

223. See, e.g., S. GLUECK, *MENTAL DISORDER AND THE LAW*, 382-83, 412-17 (1925) (advocating reduction of punishment in response to evidence of mental disorder so that punishment serves needs of society without unduly penalizing the offender); W. SULLIVAN, *CRIME AND INSANITY* 251 (1974) (advocating special treatment of offender with diminished responsibility short of insanity); H. WEINHOFEN, *supra* note 170, at 175-77 (mental disorders considered mitigating circumstances); Dix, *supra* note 166, at 332-34 (strict insanity test should be supplemented by more flexible test of abnormality).

224. See *Gregg v. Georgia*, 428 U.S. at 183-84 (retribution not dominant but also not prohibited justification for punishment).

225. *Id.* at 183 n.29.

for analyzing whether mental disorder should be a mitigating factor when capital punishment may be imposed.

Packer identifies two explanations for society's need for retribution: expiation and vengeance.<sup>226</sup> Under the expiatory view, punishment is justified as the means by which the criminal atones for his sin;<sup>227</sup> thus, the degree of suffering is critical to the punishment imposed.<sup>228</sup> Retribution based on revenge<sup>229</sup> emphasizes the infliction of visible suffering on the wrongdoer to avenge society for his misdeeds.<sup>230</sup>

The expiation justification for punishment traditionally was a theological one that rarely emerges in modern writing as a major goal of capital sentencing.<sup>231</sup> To the degree that it is viable, however, it mandates mitigation for mental disorders. This conclusion is grounded in the early conviction that mentally disordered offenders

226. See H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 31, 37-44 (1968).

227. *Id.* at 38. Because sin has no meaning if persons' actions are not a product of free will, some notion of personal responsibility must underlie the expiation theory of retribution. Nevertheless, responsibility under the expiation theory runs ultimately to some higher authority than society. See *id.* at 37. This article focuses on the type of responsibility that runs to society and is thus relevant to the revenge theory of retribution. See note 239 *infra* and accompanying text.

228. *Id.* at 38. Packer criticizes the expiation theory as a dogmatic belief lacking any verifiable basis. *Id.* at 38-39.

229. Packer discusses three justifications for punishment based on revenge. First, punishment may be motivated by pure revenge. *Id.* at 37. This explanation is generally used to justify the death penalty when the crime is particularly heinous, and was the one primarily relied on in the *July 2 Cases*. See *Gregg v. Georgia*, 428 U.S. 153, 184 (1976) (plurality opinion) (death may be only adequate response to crimes so grievous that they are affront to humanity). Second, the death penalty may curb the community's "blood lust" for revenge and reduce the anarchy of mob justice. H. PACKER, *supra* note 226, at 37; see *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) (when people think that organized society will not impose deserved punishment, they resort to vigilante justice). Third, the death penalty serves a deterrent function that flows from the need for revenge: the spectacle of merited suffering increases the general identification with law-abiding behavior by stigmatizing criminality. H. PACKER, *supra* note 226, at 43-44, cited in *Gregg v. Georgia*, 428 U.S. at 183.

Packer criticizes the first two justifications as totally without any verifiable basis in reality. H. PACKER, *supra* note 226, at 38-39. Only the third adequately justifies revenge as a purpose for punishment. See *id.* at 44.

230. H. PACKER, *supra* note 226, at 37. The revenge basis for punishment assumes free will; thus, the man who is responsible for his actions should suffer the consequences. *Id.*; see Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 388 (1976). The public desire to inflict suffering reflects the societal need for vengeance. The public spectacle satisfies the blood lust drive and reinforces a feeling of public willingness to abide by the law. H. PACKER, *supra* note 226, at 44; see note 229 *supra*.

231. See E. EVANS, *THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT* 9 (1906) (among ancients, punishment based in part on belief that unless murder properly expiated, divine being would punish society at large; view began to recede by end of nineteenth century); 1 N. WALKER, *supra* note 136, at 27, 247 (expiatory theory that focuses on degree of suffering still discussed but not entirely logical); Letter from Judge Learned Hand to the editors of the *University of Chicago Law Review* (undated), reprinted in 22 U. CHI. L. REV. 319 (1955) (sense that justice requires law breaker to suffer just as sinner should suffer is vestige of primitive belief that still exists in most people); note 228 *supra*.

deserve differential treatment because the "madman" is punished enough by his madness.<sup>232</sup> Under an expiatory theory of retributive justice the degree of suffering from whatever source must be commensurate with the gravity of the crime,<sup>233</sup> and the sentencing authority should credit against the offender's sentence the degree of suffering that mental disorder has already visited upon him.<sup>234</sup>

A humanistic rather than theological approach to expiation mandates that persons suffering from infirmities that lead them instinctively but unwillingly into crime deserve pity and perhaps institutionalization, but not punishment.<sup>235</sup> This view, which has more support among modern commentators, suggests that a compassionate society should mitigate the retributive punishment of the mentally afflicted whose suffering in some measure atones for their wrongdoing.<sup>236</sup> Only those offenders who truly suffer because of their mental condition or who are tormented consciously by their calamity deserve the benefit of an expiation-justified reduction in punishment commensurate with the degree of such suffering.<sup>237</sup>

Unlike expiation theories of retributive justice, the vengeance-based theories have solid contemporary support as valid justifications for punishment.<sup>238</sup> Because mental abnormality tends to undermine

232. See 1 N. WALKER, *supra* note 136, at 27, 247 (originally Roman view; appears in writings of Coke, Hume, and others).

233. See 2 G. MACKENZIE, *supra* note 148, at 59 (against Christian charity to add more affliction to those afflicted with insanity by imposing punishment).

234. *Id.* (extending Roman maxim that absolute madness substitute for all punishment, partial madness should be regarded as partial substitute); see *Hamblin v. State*, 81 Neb. 148, 168, 115 N.W. 850, 857 (1908) (death sentence reduced to life imprisonment in part because mentally disordered offender suffered greatly during life); Letter from Judge Hand, *supra* note 231 (belief that wrongdoers should suffer as a purpose for punishment will affect impact of mental disorder on punishment).

235. J. PRICHARD, *ON THE DIFFERENT FORMS OF INSANITY IN RELATION TO JURISPRUDENCE* 178 (London 1842) (human compassion forbids adding to plight of mentally disordered sufferer).

236. See *State v. Noel*, 102 N.J.L. 659, 680, 133 A. 274, 288 (1926) (Minturn, J., concurring) (living death of insanity sufficient punishment); A. GOLDSTEIN, *THE INSANITY DEFENSE* 12 (1967) (compassionate response to mentally abnormal defendants developed as corollary to other retributive theories); Barnett, *The Grounds of Pardon*, 6 ORE. L. REV. 205, 210 (1927) (pity reflected in pardon is increased when offender's condition unusually poor); cf. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (death sentencing system unconstitutional if ignores "compassionate . . . factors" derived from human frailties).

237. J. PRICHARD, *supra* note 235, at 178.

238. See, e.g., ROYAL COMMISSION ON CAPITAL PUNISHMENT, *supra* note 167, at 206 (sometimes capital punishment is imposed because society insists on adequate punishment for outrageous acts and because wrongdoer deserves it regardless of deterrent impact); Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WIS. L. REV. 781, 798 (retribution, which imposes punishment to the extent of blameworthiness, is substantial justification for present penal system); Greenwalt, "Uncontrollable" Actions and the Eighth Amendment: Implications of *Powell v. Texas*, 69 COLUM. L. REV. 927, 938 (1969) (retribution justifies punishment of those who are morally blameworthy); Wasserstron, *H.L.A. Hart and the Doctrines of Mens Rea and Criminal Responsibility*, 35 U. CHI. L. REV. 92, 93 (1967) (punishment based on retribution requires proof of *mens rea*).

responsibility, a predicate for punishment based on vengeance,<sup>239</sup> it supports mitigating the death sentence whenever the validity of execution depends on this aspect of the retributive justification for punishment.<sup>240</sup> This conclusion is supported by the evolution of legal defenses dealing with mental disorder at the guilt or innocence stage of the trial and by the inability of these defenses to solve completely the problem arising when responsibility is affected but not destroyed.

The insanity defense and the more recently developed diminished capacity defenses grew out of the perception that abnormal mentality tempers the justification for criminal punishment because the individual's responsibility for the crime is diminished or removed.<sup>241</sup> Traditionally, the insanity defense arose when a mentally disordered defendant was unable to know society's rule of conduct or to know how his own conduct comports with these rules.<sup>242</sup> Many jurisdictions today apply a much broader insanity defense that exonerates not only cognitively disordered wrongdoers but also offenders who lack the volitional capacity to control their wrongful actions.<sup>243</sup>

In recent years, more and more states have recognized the related concept of a diminished capacity defense, which permits a defendant to prove that because he suffered from a mental disorder he could not have had the mental state required for conviction.<sup>244</sup> In its most

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239. See H. PACKER, *supra* note 226, at 37.

240. To retain the respect of society, punishment must be scaled to the degree of societal condemnation, which in turn depends on the "moral turpitude" of the defendant. As such, it is difficult to imagine a crime worthy of the death penalty that does not include a high degree of culpability as an element. Thus, mental abnormality must be considered in virtually every capital case in which it affects culpability. See DIX, *supra* note 166, at 332.

241. See, e.g., A. GOLDSTEIN, *supra* note 236, at 15, 89, 91 (insanity defense); Bazelon, *Responsibility and Mental Competence*, 46 F.R.D. 497, 507-10 (1968) (insanity defense); DIX, *supra* note 166, at 332-33 (diminished capacity and partial responsibility defenses).

242. *M'Naghten's Case*, 8 Eng. Rep. 718, 722-23, H.L. (1843); see Moore, *M'Naghten is Dead—Or Is It?* 3 Hous. L. Rev. 58, 58-59 (1965) (criticizing narrowness of *M'Naghten* test of insanity). Many jurisdictions interpret the "knowledge" formulation broadly enough to go beyond strictly intellectual knowledge to include understanding of the nature and consequences of one's acts. See A. GOLDSTEIN, *supra* note 236, at 49-50, 236 n.13.

243. This version of the insanity defense was included in the American Law Institute's Model Penal Code. MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962); see A. GOLDSTEIN, *supra* note 236, at 86-96 (discussing modernized defense). Identical or similar formulations have been adopted in many jurisdictions. See *United States v. Brawner*, 471 F.2d 969, 979 (D.C. Cir. 1972) (listing federal jurisdictions that have adopted Model Penal Code); A. GOLDSTEIN, *supra* note 236, at 67-74 (*M'Naghten* supplemented by irresistible impulse test used in many jurisdictions); Keedy, *Irresistible Impulse as a Defense in Criminal Law*, 100 U. PA. L. REV. 956, 976-85 (1952) (discussing states that have adopted insanity defense and form in which adopted).

244. 30 VAND. L. REV. 213, 213-14 (1977); see A. GOLDSTEIN, *supra* note 236, at 194-95 (discussing spread of doctrine of diminished responsibility); ROYAL COMMISSION ON CAPITAL PUNISHMENT, *supra* note 156, at 413-14 (discussing trend in United States to accept some form of diminished responsibility defense). For a recent, critical view of these defenses, see Arenella, *The Diminished Capacity and Diminished Responsibility Defenses—Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827 (1977).

extreme expression, this defense results in total exoneration either from any crime, because the mental disorder established negates the element of voluntariness essential to make the actor a criminal, or at least from any crime requiring proof of a specific mental state that is negated by the defendant's volitional or cognitive impairments.<sup>245</sup> More frequently a defendant raising the diminished capacity defense is only permitted to introduce evidence of a mental disorder that rendered him incapable of performing the volitional or cognitive functions necessary to form the intent required under a higher degree of the crime.<sup>246</sup>

Many legal scholars and mental health professionals have argued that because of the difficulties that disordered defendants encounter in establishing these defenses to conviction, many such offenders should have the additional opportunity to receive less severe retributive punishment.<sup>247</sup> They note that, even if insufficient to establish a defense at the guilt or innocence stage of the trial,

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245. See *United States v. Brawner*, 471 F.2d 969, 998, 1002 (D.C. Cir. 1972) (testimony on abnormal mental condition admissible if it relates to existence of specific mental element necessary for crime; second degree murder conviction remanded with instructions); *People v. Gorshen*, 51 Cal. 2d 716, 723, 733, 336 P.2d 492, 496, 503 (1959) (court may hear evidence of mental condition of accused to show lack of criminal intent, malice, premeditation, or voluntariness); A. GOLDSTEIN, *supra* note 236, at 199-202 (discussion of extreme extension of partial responsibility defense).

This "total" diminished capacity defense is very similar to the liberal insanity defense accepted in other jurisdictions. It need not, however, be deferred to the insanity stage of the trial. See *People v. Wells*, 33 Cal. 2d 330, 350, 202 P.2d 53, 66 (1949) (prosecution may not delay voluntariness issue to insanity stage of trial). Moreover, a mental condition might not establish an insanity defense but still might be sufficient to require acquittal because of the lack of volition. See *United States v. Brawner*, 471 F.2d at 1005 (dictum) (question whether jury that convicted under insanity defense will acquit under new standard left open); MODEL PENAL CODE § 2.01 (Proposed Final Draft 1962) (liability for offense requires voluntary act).

The diminished capacity defense may also be utilized when the mental abnormality supports only a lack of the special types of intent necessary to support murder, as opposed to other forms of homicide; in that instance it evinces a more cognitive, less volitional, approach. See *People v. Conley*, 64 Cal. 2d 310, 322, 411 P.2d 911, 918, 49 Cal. Rptr. 815, 822 (1966) (defendant who cannot comprehend duty to govern his actions in accord with law lacks malice aforethought). See generally *Dix*, *supra* note 166, at 328-32; Note, *Keeping Wolff from the Door: California's Diminished Capacity Concept*, 60 CALIF. L. REV. 1641 (1972).

246. See 30 VAND. L. REV. 213, 214-15, 217-19 (1977) (diminished capacity defense in at least twelve states can reduce degree of crime when gradation into degrees based on changes in required *mens rea*). This defense is also used in England to reduce murder to manslaughter if the defendant's mental responsibility is impaired. The Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 2(1); see Prevezer, *The English Homicide Act: A New Attempt to Revise the Law of Murder*, 57 COLUM. L. REV. 624, 636-42 (1957).

247. See, e.g., A. GOLDSTEIN, *supra* note 236, at 110-15 (discussing difficulties in proving insanity defense to jury); Bazelon, *supra* note 230, at 390-98 (difficulty in establishing insanity defense results in culpability imposed on blameless acts); *Dix*, *supra* note 166, at 333-34 (traditional state of mind requirements not suitable vehicle for integrating criminal liability and mental disorder); Szasz, *Criminal Responsibility and Psychiatry*, in LEGAL AND CRIMINAL PSYCHOLOGY 152-56 (H. Toch ed. 1961) (unrealistic emphasis on reason in insanity defense results in mentally ill person treated as criminal).

evidence of a mental abnormality should be considered at sentencing as a basis for mitigating punishment because of the defendant's attenuated responsibility.<sup>248</sup> Thus, to the extent that cognitive or volitional impairment reduces responsibility, the societal need for vengeance is correspondingly diminished, and mitigation of punishment is warranted.<sup>249</sup>

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248. See, e.g., S. GLUECK, *supra* note 223, at 383-84, 413-17 (provision should be made for procedure in which defendant found guilty because mental disorder too mild for acquittal might argue for reduced sentence because of limited responsibility); H. WEIHOFEN, *supra* note 170, at 176 (many authorities argue that borderline cases of mental unsoundness should mitigate punishment); Arenella, *supra* note 244, at 850-51 (mental abnormality as circumstance mitigating sentence useful when category of crime does not accurately reflect defendant's lower degree of culpability); Dix, *supra* note 166, at 332-33 (after guilt established trier of fact should be permitted to find that defendant's mental disorder diminished responsibility and to impose lesser sentence on that basis); cf. Handler, *Background Evidence in Homicide Cases*, 51 J. CRIM. L.C. & P.S. 317, 322, 327 (1960) (background evidence of mental disorder short of insanity should be considered at separate sentencing in mitigation or aggravation of punishment). This view was endorsed by the drafters of the Model Penal Code. See MODEL PENAL CODE § 402(2) Comment (Tent. Draft No. 4, 1955) (impaired mental capacity included as factor in mitigation of death penalty because it reduces responsibility and is especially critical in jurisdiction with strict insanity defense); ROYAL COMMISSION ON CAPITAL PUNISHMENT, *supra* note 167, at 121 (in Scotland, although strict insanity defense makes acquittal unlikely, plea of diminished responsibility generally results in mitigation of punishment).

249. See *Coleman v. United States*, 357 F.2d 563, 564 (D.C. Cir. 1965) (statute authorizes judge to consider factors in mitigation of sentence and to reduce sentence from death to life imprisonment; death sentence ordered reduced in light of strong evidence of retardation and potential for rehabilitation); *Hamblin v. State*, 81 Neb. 148, 168, 115 N.W. 850, 857 (1908) (mitigation proper because of grave doubts as to defendant's responsibility for actions even though he was not idiot, imbecile, or maniac); *State v. White*, 27 N.J. 158, 184, 142 A.2d 65, 79-80 (1958) (Francis, J., concurring) (eloquent statement of need to consider defendant's mental condition as it bears on his degree of responsibility for purposes of punishment); Dix, *supra* note 166, at 333-34; cf. The Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 2(1) (punishment reduced if defendant shows abnormality of mind substantially impairing mental responsibility for act).

One obvious source for guidance in determining the degree to which responsibility is impaired and thus the degree of mitigatory treatment due might be found in a jurisdiction's own rules for dealing with mental disorder at the guilt or innocence stage of the trial. For example, a cognitively impaired but not insane defendant in a jurisdiction adhering to the *M'Naghten* rule might deserve mitigatory treatment if his ability to know right from wrong is significantly impaired. See MODEL PENAL CODE §§ 4.01(1), 210.6(4) (Proposed Final Draft 1962) (insanity defense turns on proof that defendant *lacks* capacity to appreciate the criminality of his conduct or to conform to law, while mitigation permitted if same capacity *impaired* due to mental defect); note 242 *supra* and accompanying text. A more lenient standard of proof for mitigation than that required for acquittal might be appropriate, however. See A. GOLDSTEIN, *supra* note 236, at 110-15 (insanity defense often requires preponderance of evidence and, in some jurisdictions, proof beyond a reasonable doubt). Nevertheless, the jurisdiction's particular law cannot restrict the inquiry into mitigation of the death penalty due to impairment of responsibility. The eighth amendment's measuring stick incorporates more than one jurisdiction's views on penological justifications; the perceptions of the institutional participants in other jurisdictions' criminal justice systems as well as those of legal scholars, psychologists, psychiatrists, and philosophers must be considered, and arguably a national standard must be applied. See note 39 *supra*. Under such a standard, both volitional and cognitive impairments deserve mitigatory consideration.

*Deterrence.* In discussing deterrence the plurality in the *July 2 Cases* again accepted a view popularized by the late Professor Packer when it opined that the deterrent effect of punishment, while not a factor in the mental calculus of every potential offender, nonetheless may play a significant role in some cases.<sup>250</sup> Indeed, the plurality characterized many post-*Furman* statutes as reflecting legislative attempts "to define those crimes and those criminals for which capital punishment is most probably an effective deterrent."<sup>251</sup>

The reference to "crimes and . . . criminals" is particularly instructive for it suggests an awareness that the deterrent function operates on several levels. Traditionally, commentators have divided deterrence into two categories: specific and general.<sup>252</sup> Specific deterrence provides after-the-fact inhibition of the individual offender to prevent recurrence of the criminal action,<sup>253</sup> and is clearly meaningless in the capital punishment context. General deterrence, on the other hand, creates an inhibition *in advance* by threat or example,<sup>254</sup> and is traditionally the category of deterrence referred to in discussions of the death penalty's penological value. A careful reading of the plurality's discussion of deterrence reveals that the three justices apparently subdivided general deterrence into two types of penological justification. Taking a subjective view of general deterrence, they asked whether the threat of capital punishment might have some impact on a particular criminal's decision to commit an offense:

We may nevertheless assume safely that there are *murderers*, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many *others*, the death penalty undoubtedly is a significant deterrent.<sup>255</sup>

Taking an objective perspective, the plurality then asked whether the

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250. *Gregg v. Georgia*, 428 U.S. at 185-86 n.33; see H. PACKER, *supra* note 226, at 45 (deterrent role of criminal law effective mainly with respect to individuals subject to socializing influences; deterrent role does not affect individuals whose value systems are closed to modification). See generally W. CHAMBLISS, *CRIME AND THE LEGAL PROCESS* 368-72 (1969); F. ZIMRING & G. HAWKINS, *DETERRENCE* 96-128 (1973); Chappell, Geis & Hardt, *Explorations in Deterrence and Criminal Justice*, 8 CRIM. L. BULL. 514, 519-24 (1972).

251. *Gregg v. Georgia*, 428 U.S. at 186.

252. *E.g.*, H. PACKER, *supra* note 226, at 39; F. ZIMRING & G. HAWKINS, *supra* note 250, at 224-25; Andenaes, *Does Punishment Deter Crime?*, 11 CRIM. L.Q. 76, 78 (1968).

253. H. PACKER, *supra* note 226, at 39; accord, Andenaes, *supra* note 252, at 78.

254. H. PACKER, *supra* note 226, at 39; Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA., L. REV. 949, 951 (1969).

255. 428 U.S. at 185-86 (emphasis added).

threat of capital punishment will restrain reasonable persons from committing that crime in the future:

There are carefully contemplated *murders*, such as *murder for hire*, where the penalty of death may well enter into the cold calculus that precedes the decision to act. [A footnote here catalogues "other types of *calculated murders*."] And there are some *categories of murder* such as *murder by a life prisoner*, where other sanctions may not be adequate.<sup>256</sup>

If the pointed emphasis on the deterrability of different types of criminals was removed from the first quoted passage, the entire discussion would become a statement of objective deterrence and make the relatively simple point that punishment will have the desired deterrent effect only when it is meted out in response to deterrable crimes. By focusing on types of criminals, however, the first passage suggests that the plurality would find the death penalty more justified if the offender was capable of being deterred at the time he committed an offense. Hence, the comparative deterrability of different classes of criminals appears to have at least as much significance in eighth amendment adjudication as the comparative deterrent impact on the general population of imposing punishment for different classes of crimes.<sup>257</sup>

Current proponents of the concept of deterrence have attempted,

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256. *Id.* at 186 & n.33 (emphasis added).

257. This subjective deterrence doctrine is analytically puzzling: Although included in the plurality's discussion of general deterrence, the subjective approach actually embodies characteristics of both general and specific deterrence. Like the traditional concept of general deterrence, it focuses on before-the-fact impacts of punishment; like specific deterrence, however, it depends on the impact of punishment on a particular individual. Moreover, by differentiating deterrable from nondeterrable classes of individuals, the plurality seemed to inject its discussion of deterrence with retributive considerations; that is, a person who commits a capital crime despite an understanding of society's abhorrence of his actions, and despite a capacity for acting otherwise, is especially deserving of societal revenge. Note that under this rationale it is the failure of the ultimate sanction as a deterrent that justifies capital punishment of the offender. Conversely, individuals who cannot be deterred because they cannot control or understand their actions evoke a more sympathetic response; their diminished responsibility undercuts the basis for feelings of vengeance. Because they and others like them will not be deterred by the threat of capital punishment, to inflict that sanction makes little sense.

In fact, although well grounded in retributive theory, the plurality's belief that a deterrable criminal is more justifiably punished with death than his nondeterrable counterpart does not rely on the traditional educative explanations for the deterrence justification. Commentators typically view deterrence as the use of punishment to socialize potential offenders. See H. PACKER, *supra* note 236, at 39. General deterrence educates the general populace by making an example of the wrongdoer, while specific deterrence educates the particular criminal by punishing him for his antisocial act. Neither of these rationales, however, explains why it is better to execute a deterrable than a nondeterrable criminal.

much more than their utilitarian predecessors, to identify the particular individuals most likely to be deterred by the threat of punishment.<sup>258</sup> These writers have recognized that the insane and the mentally disordered are unresponsive as objects of deterrence because they lack the intellectual capacity to understand the threat of punishment, or the control mechanisms necessary to conform to that understanding.<sup>259</sup> Thus, to the extent the function of punishment is to deter the potential offender, mentally abnormal persons not susceptible to deterrence ought not to be punished.<sup>260</sup>

Efforts to distinguish offenders on the basis of the likelihood that the threat of punishment will deter them have resulted in the identification of several aberrant personality types that are especially immune to such deterrence.<sup>261</sup> Nonetheless, the wide range of

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258. Compare Chappell, Geis & Hardt, *supra* note 250, at 520-24 (reviewing theorists' attempts to identify individuals who will be deterred by threats of punishment) and Geerking & Gove, *Deterrence: Some Theoretical Considerations*, 9 LAW & SOC. REV. 497, 509-12 (1975) (discussing potential offenders' perception of risk as a deterrent mechanism) with J. BENTHAM, *Principles of Penal Law*, in 1 WORKS 396 (1843) (making an example of offender should be chief end of punishment).

259. Andenaes, *supra* note 254, at 958; accord, Van Den Haag, *On Deterrence and the Death Penalty*, 60 J. CRIM. L.C. & P.S. 141, 143 (1969). This insight does not belong solely to modern generations. See 3 E. COKE, *supra* note 143, at 4 ("principle end of punishment is, that others by his example may fear to offend . . . but such punishment can be no example to madmen . . ."). By focusing on specific individuals, these authorities are discussing specific deterrence. Nonetheless, their analyses are also relevant to the plurality's concept of subjective deterrence. See note 257 *supra*. Furthermore, the explanations for nondeterrability given by these authorities are precisely the same as the explanations for deeming mentally disordered defendants less responsible. See *id.*

260. See Silving, *Mental Incapacity in Criminal Law*, 2 CURRENT L. & SOC. PROB. 3, 25 (1961); cf. A. GOLDSTEIN, *supra* note 236, at 12-13 (deterrence can be effective only with men who can understand signals directed at them, respond to warnings, and feel significance of sanctions imposed upon violators).

261. The most dramatic example of such a personality type involves offenders with suicidal desires that manifest themselves in capital offenses undertaken to evoke the ultimate sanction. See *Furman v. Georgia*, 408 U.S. 238, 351 & n.113 (1972) (Marshall, J., concurring) (capital punishment may encourage suicidal or notoreity-seeking individuals to commit crimes); G. ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 24-26 (1954) (discussing *Burton's Case*, in which defendant testifies at trial that he committed homicide in order to be hanged); F. ZIMRING & G. HAWKINS, *supra* note 250, at 110 (disputing numbers but not existence of offenders who feel they deserve punishment or actually seek out punishment), Goldstein, *Opponents of Death Penalty Fear Psychological Effect of Execution*, N.Y. Times, Jan. 18, 1977, at 21, col. 1 (discussing execution of Gary Gilmore, arguably a member of this class of mentally disordered offenders). Occasionally authorities have reduced the death sentence of a defendant who exhibits this condition. See Ehrmann, *supra* note 113, at 19-20 (citing cases); cf. Silving, *The Criminal Law of Mental Incapacity*, 53 J. CRIM. L.C. & P.S. 129, 160 (1962) (criminal law need not embody special rules for lessened punishment in such case because offenders will qualify for psychiatric treatment).

Other recognizable groups of relatively nondeterrable potential offenders identified by legal scholars and social scientists are the mentally retarded and psychopaths. See *generally* notes 278-332 *infra* and accompanying text.

psychological infirmities that may affect an individual's deterrability, and thus the penological justification for punishing him under the subjective perspective of deterrence, argue for a general eighth amendment principle of mitigation that is functionally related to deterrence. Accordingly, a mentally disordered offender should receive mitigatory consideration to the extent that his susceptibility to the deterrent effect of the threat of punishment was impaired because of his inability to understand society's moral outrage at capital crimes or to conform his actions to that understanding.<sup>262</sup>

That an offender is mentally disordered might initially appear to bear little correlation to the objective deterrent effect that his capital punishment may have on reasonable members of society. Certainly the general population will be put on notice that a person who has committed a particular crime has been executed for his proscribed actions. Nonetheless, writers of the caliber of Glanville Williams, Jerome Michael, and Herbert Wechsler have carried the assumptions underlying objective deterrence to the logical conclusion that abnormal offenders are so distinguishable from other members of the population that failure to punish them does not impair the deterrent effect of threatened punishment on normal members of the population.<sup>263</sup> It follows that an abnormal offender whose punishment would not significantly deter others deserves to have that fact considered in mitigation of the death penalty.<sup>264</sup>

For at least two reasons, this objective perspective of deterrence should carry little weight in mitigation decisions. First, any consideration of how a particular defendant's punishment will appear to the average citizen may place an insurmountable burden of proof on both the defense and the prosecution.<sup>265</sup> Second, many commen-

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262. Cf. DANISH CRIMINAL CODE OF 1930, § 17 (E. Giersing & M. Grunhut trans. 1958) (court may decide, on basis of medical report and other evidence, whether defendant susceptible to punishment), discussed in Silving, *supra* note 261, at 158.

263. G. WILLIAMS, CRIMINAL LAW 467 (1961); Michael & Wechsler, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 752-57 (1937); see A. GOLDSTEIN, *supra* note 236, at 13 (threats and examples likely to deter only if person not involved in the criminal process identifies with offender; identification improbable if offender so different from most men that crime can be attributed to difference); cf. 3 E. COKE, *supra* note 143, at 6 (execution of a madman is miserable spectacle that can be no example to others).

264. See Silving, *supra* note 261, at 25 (mentally incapacitated persons whose punishment would not deter others ought not to be punished); cf. A. GOLDSTEIN, *supra* note 236, at 14 (insanity defense appropriate for defendant who is sufficiently different that he cannot be used as an effective example).

265. See C. BLACK, *supra* note 56, at 26 (concluding that deterrent effect of capital punishment impossible to assess), cited in *Gregg v. Georgia*, 428 U.S. 153, 185, 187 (1976) (plurality opinion) (concluding value of capital punishment as deterrent to crime is complex factual issue that should be resolved by legislatures). Compare Ehrlich & Gibbons, *On the Measurement of the Deterrent Effect of Capital Punishment and the Theory of Deterrence*, 6 J.

tators argue that deterrence objectively perceived cannot by itself justify punishment, for otherwise the state could justifiably convict a man known by the authorities to be innocent but supposed by everyone else to be guilty.<sup>266</sup>

#### A FOUR-FACTOR ANALYSIS

Although this article has discussed the mitigatory potential of mental disorder by focusing separately on public attitudes and penological justifications, it suggests that these two avenues of analysis merge for purposes of identifying mitigating circumstances. Thus, the historical and institutional authorities that were examined with a view to discerning public attitudes toward mental disorder as a factor mitigating the death penalty typically premised their conclusions on beliefs about the penological justifications for that punishment; Mackenzie, Hale, and Blackstone, for example, as well as American appellate judges, have clearly spoken in terms of expiation, responsibility, and deterrence in justifying mitigatory treatment of the mentally afflicted.<sup>267</sup> Moreover, although examination of contemporary death penalty statutes does not reveal their supporting rationales, the plurality in the *July 2 Cases* assumed that they too should and do reflect the substantive justifications of retribution and deterrence.<sup>268</sup> In fact, because the "objective" public attitudes relied on by the plurality are comprised of opinions tempered by

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LEGAL STUD. 35 (1977) (econometric regression analysis showing inverse relation between homicide rate and number of executions) with Forst, *The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960's*, 61 U. MINN. L. REV. 743 (1977) (econometric analysis reaching opposite conclusion). See generally Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975); Zeisel, *The Deterrent Effect of Capital Punishment: Facts v. Faith*, 1976 SUP. CT. REV. 317.

266. Greenwalt, *supra* note 238, at 939 & n.64, 940 (appropriateness of punishment not reducible to utilitarian considerations); see A. GOLDSTEIN, *supra* note 236, at 13-14 (it would be regarded as cruel and unjust to incarcerate men who are not responsible in order to serve social functions).

267. See notes 135-55 *supra* and accompanying text (early history of the law of mitigation based on mental disorder); notes 192-212 *supra* and accompanying text (appellate court treatment of mitigation based on mental disorders).

268. See *Gregg v. Georgia*, 428 U.S. at 186 (many post-*Furman* statutes reflect legislative efforts to identify crimes and criminals for which death penalty is deterrent). See generally Thomas, *supra* note 35, at 1005. This assertion is consistent with the empirical study of Professor Thomas. Relying on data obtained from a randomly selected sample of more than three thousand heads of household in a metropolitan area, Professor Thomas positively correlated public support for capital punishment with two persuasive beliefs. The first belief is retributive: some trends of behavior are sufficiently offensive to fundamental moral standards that death is an appropriate punishment. The second is that the death penalty serves the utilitarian purpose of deterring potential offenders. Accordingly, to the extent that death penalty legislation responds to such public views, it should be expected to rely on these justifications.

institutional deliberation and debate and often expressed publicly,<sup>269</sup> they are especially likely to be based on reasoned justification.

The result of this merger of public attitudes and penological justifications with respect to the mitigatory potential of mental disorder is a clear conviction among all of the sources studied that the death penalty is *sometimes* an inappropriate punishment for the mentally impaired. On the other hand, those sources also evince a striking uniformity of view, given their heterogeneity in time and discipline, that mental disorder should not always mitigate punishment, but should do so only when it reduces one or both of the penological justifications for the death penalty identified in the *July 2 Cases*. As discussed previously,<sup>270</sup> those justifications reflect retributive and deterrent values which in turn can be further differentiated: retributive values reflect both expiation and vengeance, or responsibility concepts, while deterrent values have both objective and subjective components. Taken together, these subcategories form the basis of a four-factor analysis of mitigatory potential. With respect to each mentally disordered offender the following four lines of inquiry should be pursued to determine whether and to what degree mitigation is appropriate:

- whether the offender's suffering evidences expiation or inspires compassion;
- whether the offender's cognitive and/or volitional impairment at the time he committed the crime affected his responsibility for his actions, and thereby diminished society's need for revenge;
- whether the offender, subjectively analyzed, was less affected than the mentally normal offender by the deterrent threat of capital punishment at the time he committed the crime; and
- whether the exemplary value of capitally punishing the offender, as objectively perceived by reasonable persons, would be attenuated by the difficulty those persons would have identifying with the executed offender.

Application of the four-factor analysis need not be restricted to any particular phase of the criminal justice process. Rather, because

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269. See *Gregg v. Georgia*, 428 U.S. at 173.

270. See notes 224-49 *supra* and accompanying text (expiation and vengeance theories of retribution); notes 250-66 *supra* and accompanying text (subjective and objective theories of general deterrence).

prosecutors, trial judges, juries, appellate courts, and executives considering clemency all have the opportunity to consider mitigation based on an offender's mental disorder,<sup>271</sup> each of these institutional participants in the criminal justice system might apply the analysis to determine whether mitigation is justified with respect to every defendant who manifests mental disorder. Notwithstanding its broad potential utility, the most important function of the four-factor scheme is to guide the sentencing authority. Thus, if the judge presiding at the penalty phase of a capital case determines that the defendant's condition is relevant to any justifiable theory of mitigation, under the eighth amendment she not only must permit presentation of supporting evidence,<sup>272</sup> but also must charge the jury<sup>273</sup> on the defendant's mitigatory theory. This latter requirement, while also mandated by normal trial practice rules, has reached the level of a constitutional imperative in capital sentencing cases in order to satisfy the "guidance" requirement of the *July 2 Cases*.<sup>274</sup> Accordingly, whenever the defendant has presented evidence of mental disorder in support of mitigation, the judge should instruct the jury to consider the evidence in light of each of the four factors. To assure that juries receive standardized and sufficient guidance in making their decisions, she probably should give all four instructions whether or not the defendant has explicitly attempted to tie his evidence and arguments to all of them.<sup>275</sup>

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271. See generally notes 174-219 *supra* and accompanying text.

272. See notes 105-06 & 110-27 *supra* and accompanying text.

273. The jury is not always the sentencing authority. See FLA. STAT. ANN. § 921.141 (Supp. 1976-77) (providing that the trial judge shall be the actual sentencing authority, although also providing for an advisory jury verdict). The argument that a jury is the appropriate, if not constitutionally mandated, sentencing authority is set forth in notes 44 & 49 *supra*.

274. See notes 123 & 124 *supra* and accompanying text.

275. Even on the question of mental disorder as a mitigatory factor, the four proposed instructions may not completely satisfy the guidance requirement under the eighth amendment. As noted earlier, trial participants typically have a conditional right to prophylactic instructions on specific pieces of confusing or prejudicial evidence. See note 123 *supra*. The right is conditioned on the trial judge's broad discretion to decide whether the evidence is sufficiently prejudicial to require an instruction. In the context of confusing evidence in mitigation of the death penalty, however, the trial court's discretion to deny requested instructions on potentially confusing evidence may diminish under the same constitutional imperative that requires instructions on all mitigatory theories. Accordingly, in addition to the instructions required on the defendant's mitigatory theories, additional instructions may be required whenever the mitigatory evidence is potentially confusing and could prejudice the defendant if misunderstood. See *id.*

This rule is particularly important when mental disorder is at issue because of the fear and distrust that most people feel toward the mentally ill. See, e.g., J. NUNNALLY, POPULAR CONCEPTIONS OF MENTAL HEALTH: THEIR DEVELOPMENT AND CHANGE 46 (1961) (mentally ill perceived by others as dirty, worthless, and dangerous); Aschaffenburg, *Psychiatry and Criminal Law*, 32 J. CRIM. L.C. & P.S. 3-4 (1940) (traditional religious view that soul of insane person possessed by Devil; utilitarian recognition that caring for mentally ill entails enormous expense);

Although this four-factor scheme provides the sentencing authority with some guidance in making mitigatory decisions regarding mentally abnormal offenders, it is far from a complete program for death sentencing in such cases. In particular, problems may arise from ambiguities inherent in the four proposed standards. Moreover, the relative and absolute weight to be afforded the four factors remains problematical.<sup>276</sup> By tracking criteria whose long use in analogous

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Mechanic, *Mental Health and Social Policy*, in LAW, PSYCHIATRY, AND THE MENTAL HEALTH SYSTEM 68 (B. Brooks ed. 1974) (moralistic perception that mental patients, unlike physically ill, bear responsibility for condition). Although attitudes toward mentally disordered persons are becoming more enlightened, in the context of a criminal trial many of the prejudices may be exacerbated. Compare G. CROCETTI, H. SPIRE & I. SCASSI, CONTEMPORARY ATTITUDES TOWARD MENTAL ILLNESS 9, 12 (1974) (reviewing literature showing increased awareness that mental illness is treatable disease) and Meyer, *Attitudes Toward Mental Illness in a Maryland Community*, 79 PUBLIC HEALTH REPORT 769, 771-72 (1964) (community survey study showing trend toward greater acceptance of mentally ill) with Star, *Ideas About Mental Illness*, in R. DONNELLY, J. GOLDSTEIN & R. SCHWARTZ, CRIMINAL LAW 818 (1962) (mentally ill stereotyped as threatening and unpredictable) and H. KALVEN & H. ZEISEL, *supra* note 6, at 381-85 (1966) (empirical studies showing reaction of jurors against unattractive defendants). Moreover, even if these elements of prejudice are not present, jurors often have misconceptions about how mentally disordered persons look and act, and those misconceptions may impair the jurors' ability to deliberate fairly on the mitigatory potential of the particular defendant's condition. See Note, *Psychopathic Personality: Treatment and Punishment Alternatives Under Current and Proposed Responsibility Criteria*, 10 RUTGERS L. REV. 425, 435 (1955) (sociopath's appearance does not fit expectations for mentally ill; presents picture of nearly average individual). A further difficulty is that, for a variety of reasons, jurors may find it difficult to accept the validity of authentic explanations and manifestations of mental disorder. See, e.g., A. GOLDSTEIN, *supra* note 236, at 114-37 (jurors reluctant to concede that persons somewhat like themselves are mentally ill); H. KALVEN & H. ZEISEL, *supra* note 6, at 404 (jurors disbelieve testimony of mentally ill defendants); J. NUNNALLY, *supra* at 114, 123-38 (experiments indicate that discussion of mental illness in stressful situations, as during a trial, creates anxiety and unwillingness to accept communication). See also H. KALVEN & H. ZEISEL, *supra* note 6, at 378 (extensive empirical study of juror attitudes toward insane defendants; attitudes found confused and not consistently biased for or against insane).

276. This article thus far has discussed ranking the four mitigating circumstances associated with mental disorder by simply stating that personal expiation deserves somewhat less consideration than vengeance, and that deterrence objectively perceived deserves less consideration than deterrence subjectively perceived. See notes 231-38 & 265-66 *supra* and accompanying text. Further examination reveals that eighth amendment doctrine may also rank the larger categories of retribution and deterrence. The plurality in the *July 2 Cases* acknowledged one possible ranking when it stated that "[r]etribution is no longer the dominant objective of the criminal law," but neither is it a forbidden objective . . . . *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion) (quoting *Williams v. New York*, 337 U.S. 241, 248 (1949)). Nonetheless, an alternative analysis suggests the opposite conclusion. If, as suggested in notes 257 and 259 *supra* and accompanying text, subjective deterrence is premised on components of both expiatory and responsibility analyses, three of the four factors—expiation, reduced responsibility, and subjective deterrence—will have retributive underpinnings. Moreover, two of those factors—diminished responsibility and subjective deterrence—seem deserving of far more mitigatory weight than the remaining two factors. Thus, it seems likely that much of future discourse about the death penalty under the eighth amendment will focus on the retributive, as opposed to deterrent, aspect of punishment.

Exposition of the four factor analysis also does not indicate whether mitigatory evidence could

areas of the criminal law suggests a fair degree of administrability, however, the standards serve to reduce the impact of these difficulties and probably offer the best hope that sentencing standards can transcend "meaningless 'boiler-plate' or . . . statement[s] of the obvious."<sup>277</sup>

be so substantial that the Constitution would prohibit a state from imposing capital punishment. Insofar as mental disorder holds out the possibility of all four separate mitigatory considerations applying, a rather compelling case for mitigatory treatment could be presented. Nonetheless, because a rule requiring mitigation would be tantamount to a constitutional partial responsibility defense, the Supreme Court might be loath to take this step given its past resistance to constitutionalizing any particular insanity defense. *See Powell v. Texas*, 392 U.S. 514, 536-37 (1968) (plurality opinion) (formulating constitutional rule would reduce fruitful experimentation and freeze developing dialogue between law and psychiatry); *Leland v. Oregon*, 343 U.S. 790, 800-01 (1952) (progress of science has not reached point at which it would compel court to require states to eliminate right and wrong test from criminal law). *But cf. Roberts v. Louisiana*, 431 U.S. 633, 646 (1977) (Rehnquist, J., dissenting) (state may consider an *aggravating* circumstance so grave that no permutation of mitigating factors could prevent imposition of capital punishment).

A final problem related to the weight and impact of the four mitigating circumstances identified in this article involves their relationship to aggravating circumstances that also grow out of abnormal mental condition. In general, the states have considerable latitude in relating mitigating and aggravating factors. *See Gregg v. Georgia*, 428 U.S. at 195 (Court will not insist on one scheme of relating individualizing factors). Nonetheless, when a potentially aggravating factor, such as the heinousness of a criminal act, is the result of a diseased mentality, it arguably should not count so heavily against the defendant. *See Huckaby v. State*, 343 So. 2d 29, 34 (Fla. 1977) (because atrocious manner of committing crime was direct consequence of mental illness, factor not given much aggravating weight; mitigating factors overcame aggravating ones, making death penalty inappropriate).

277. *McGautha v. California*, 402 U.S. 183, 208 (1971); *see note 21 supra* and accompanying text.

The preceding analysis has avoided discussion of the proper allocation of the burden of proof regarding the existence of the mitigating factors that make the death sentence inappropriate. This burden was placed on the defendant in an Ohio case that is now before the Supreme Court. *See State v. Lockett*, 49 Ohio St. 2d 48, 67, 358 N.E.2d 1062, 1075 (1976) (no constitutional bar to imposing burden of proving mitigation of punishment on defendant previously adjudged guilty of committing capital offense), *cert. granted*, 98 S. Ct. 261 (1977) (No. 76-6997). The Supreme Court has considered the proposition that the self-incrimination and due process clauses of the Constitution require the state to prove beyond a reasonable doubt not only every statutorily defined element of a crime but also any fact affecting the degree of culpability. *See Patterson v. New York*, 432 U.S. 197, 214 n.15 (1977) (discussing and narrowing *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975), which had suggested that due process requires prosecution to prove beyond a reasonable doubt any fact affecting degree of criminal culpability); *In re Winship*, 397 U.S. 358, 364 (1970) (due process clause requires proof beyond a reasonable doubt of every fact necessary to constitute crime). Although the Court in *Patterson* declined to extend *Mullaney* to require the state to rebut the defendant's affirmative defenses with proof beyond a reasonable doubt, the uniqueness of the death penalty may persuade the Court to expand traditional notions of procedural fairness in death penalty cases. *Cf. Gardner v. Florida*, 430 U.S. 349, 361 (1977) (plurality opinion) (in death penalty cases, unlike normal sentencing situations, due process requires disclosure to defendant of all confidential presentence reports prior to sentencing hearing). Expanding on this approach to the burden of proof question might lead to the following analysis. *Winship* and *Mullaney*, as interpreted in *Patterson*, establish the rule that the state must prove beyond reasonable doubt any fact that spells the difference

### III. THE FOUR-FACTOR MITIGATORY SCHEME APPLIED: THE MENTAL RETARDATE AND THE SOCIOPATH

Thus far, this article has employed the generic terms, "mental disorder" and "mental abnormality," to refer to all mental states that may deserve mitigatory treatment. This lack of psychiatric specificity may be explained as an attempt to identify general criteria for use in assessing the mitigatory potential of any abnormal mental condition suffered by a capital defendant. Nevertheless, an undifferentiated approach to mental disorder masks the fact that modern psychiatry recognizes the existence of a variety of distinct mental conditions, each with its own etiology and symptoms.<sup>278</sup> Thus, although no two mentally disordered defendants will present the same mitigating circumstances, psychiatric research makes possible meaningful generalizations about how the symptoms of various recognized mental disorders are likely to relate to the four-factor scheme. Therefore, partially in an effort to acknowledge the value of psychiatry for mitigatory decisionmaking in death penalty cases,<sup>279</sup> and more importantly to illustrate the mitigatory potential of two broad categories of mental disorder that may afflict capital offenders, the following two sections apply the four part scheme to two general categories of mental disorder: mental retardation and sociopathy.

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between guilt and innocence, but not those facts affecting the *degree* of guilt or punishment. There are two bases for this rule. First, proof beyond a reasonable doubt is constitutionally required before conviction because an incorrect finding of guilt would deprive a defendant of liberty, stigmatize him, and destroy public confidence in the criminal process. *In re Winship*, 397 U.S. at 363-64. Second, once the defendant's commission of a statutorily defined crime is accurately established, the scope of the evils engendered by an incorrect assessment of the appropriate degree of punishment does not rise to constitutional significance. *See Patterson v. New York*, 432 U.S. at 208-10 (discussing limits of due process requirements). Because death is so qualitatively different from other sanctions, however, the effect on liberty interests and public confidence of a wrong choice between imprisonment and execution is arguably at least as significant as that created by a mistaken determination of guilt. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) ("because of that qualitative difference [between a death sentence and life imprisonment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"); *cf. Speiser v. Randall*, 358 U.S. 513, 525-26 (1958) (reliability of guilt determination increased by placing burden of proof beyond reasonable doubt on government).

278. *See generally* F. MILLER, R. DAWSON, G. DIX & R. PARNAS, *THE MENTAL HEALTH PROCESS*, 27-49 (1971); A *COMPREHENSIVE TEXTBOOK OF PSYCHIATRY* (A. Freedman & H. Kaplan eds. 1967) [hereinafter cited as *TEXTBOOK OF PSYCHIATRY*]; *cf. R. WOODY, LEGAL ASPECTS OF MENTAL RETARDATION* 17-18 (1974) (criticizing legal rules that confuse mental illness and mental retardation).

279. *See Crump, supra* note 102, at 571 (psychiatrists have ability to aid sentencing jury on issues, including defendant's capacity to deliberate and commit future acts of violence). *But cf. Diamond, From Durham to Brawner, A Futile Journey*, 1973 WASH. U.L.Q. 109, 114-15 (uncertainty in psychiatric discipline reduces value of psychiatric testimony).

## THE MITIGATORY POTENTIAL OF MENTAL RETARDATION

Psychiatrists have defined mental retardation with increasing sophistication during this century.<sup>280</sup> Some authorities have focused on symptoms and others on causes of the mental defect. From a symptomatic perspective, subnormal intelligence is the most common definitional characteristic of mental retardation.<sup>281</sup> Recent commentary, however, usually adds or substitutes a behavioral definition that focuses on the inability of retardates to conform their actions to social norms.<sup>282</sup> Writers who take the etiological perspective contend intellectual or behavioral maturity.<sup>283</sup> Proponents of this definition,

280. See generally R. WOODY, *supra* note 278, at 10-19; Cytryn & Lourie, *Mental Retardation*, in *TEXTBOOK OF PSYCHIATRY*, *supra* note 278, at 819. The condition originally was called "feeble-mindedness" and was subdivided into "idiocy", "imbecility" and "morosity." See S. GLUECK, *supra* note 223, at 333-34; Address by W. Fernald before the Massachusetts Medical Society (June 12, 1912), *quoted in* J. WALLIN, *MENTAL DEFICIENCY* 78 (1956). More recently authorities have employed the terms "mental defectiveness", "mental deficiency", "subnormality", and "mental retardation." R. TREDGOLD & K. SODDY, *TEXTBOOK OF MENTAL DEFICIENCY* (10th ed. 1963); J. WALLIN, *supra*.

281. S. BRAKEL & R. ROCK, *THE MENTALLY DISABLED AND THE LAW* 341-42 (rev. ed. 1971); S. GLUECK, *supra* note 223, at 333. The importance of intelligence is reflected in the various intelligence-quotient (I.Q.) scales that measure intelligence to categorize all persons, including retardates. See R. WOODY, *supra* note 278, at 30-31. *But cf.* B. SARASON, *PSYCHOLOGICAL PROBLEMS IN MENTAL DEFICIENCY* 42-48 (3d ed. 1959) (criticizing overuse of I.Q. test in definition and identification of mental retardation).

282. See E. A. DOLL, *The Essentials of an Inclusive Concept of Mental Deficiency*, 46 *AM. J. MENTAL DEFICIENCY* 214, 215 (1942) (suggesting that social competence be considered); Sternlicht, *A Theoretical Model for Psychological Treatment of Mental Retardation*, 68 *AM. J. MENTAL DEFICIENCY* 620 (1964) (identifying emotional response to low intelligence as a secondary indicator of retardation).

The classical model discerns a functional relationship between mental retardation and the proclivity to commit crimes. See R. TREDGOLD & K. SODDY, *supra* note 280, at 260 (modern reiteration of this view); Address by W. Fernald, *quoted in* J. WALLIN, *supra* note 280, at 78 (every feeble-minded person is a potential criminal given the proper environment and opportunity). See generally Beier, *Behavioral Disturbances in the Mentally Retarded*, in *MENTAL RETARDATION* 453, 466-68 (H. Stephens & R. Heber, eds. 1964). However, during the 1940's the view that mental retardation bore no abnormal statistical relation to criminality began to prevail. R. WOODY, *supra* note 278, at 43; Levy, *The Role of Mental Deficiency in the Causation of Crime*, 58 *AM. J. MENTAL DEFICIENCY* 455, 458-59 (1954). More recently, the dominant view has been that retardates are somewhat more likely to commit crimes or be apprehended than members of the general population. Allen, *The Retarded Offenders, Unrecognized in Court and Untreated in Prison*, *FED. PROBATION*, September, 1968, at 22-24; Smith, *Criminality and Mental Retardation*, 59 *TRAINING SCH. BULL.* 74, 78 (1962). It is clearly recognized, however, that retardates who do break the law tend to commit crimes of violence. Thus, even if the percentage of retardates in prison accurately reflects their proportion to the general population, they are overrepresented in the class of capital offenders. *E.g.*, W. BROMBERG, *THE MOLD OF MURDER* 202 (1961); J. WALLIN, *supra* note 280, at 99; Brown, Courtless & Silber, *Fantasy and Force: A Study of the Dynamics of the Mentally Retarded Offender*, 61 *J. CRIM. L.C. & P.S.* 71 (1971) (most frequent crime committed by retardates is homicide).

283. See A. BINET & T. SIMON, *MENTALLY DEFECTIVE CHILDREN* 18-23 (1914) (pioneering work claiming that retarded children are the victims of disease, constitutional debility, or malnutrition); Heber, *Modifications in the Manual on Terminology and Classification in Mental*

however, disagree over nomenclature applicable to persons who exhibit the same arrested-development symptoms as the organically impaired, but whose mental disorder is apparently caused by such environmental factors as cultural deprivation. Although some commentators exclude this syndrome from the category of mental retardation, the majority categorizes sociocultural defects as a subclass of mental retardation.<sup>284</sup>

Various legal definitions of mental retardation also have surfaced. In many cases courts and legislatures have concluded that retardation encompasses a multitude of symptomatic and etiological afflictions, the severity of which may bear on mitigatory decisionmaking in death sentencing.<sup>285</sup> Therefore, for purposes of the following four-factor

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*Retardation*, 65 AM. J. MENTAL DEFICIENCY 499, 499 (1961).

These organic impairments emanate from a multitude of causes: metabolic or chromosomal disorders, severe prematurity, brain damage during labor, and postnatal infections, poisoning, and blows to the head. *See generally* Cytryn & Lourie, *supra* note 280, at 820-34.

284. *Compare* M. STERNLICHT & M. DEUTSCH, PERSONALITY DEVELOPMENT AND SOCIAL BEHAVIOR IN THE MENTALLY RETARDED 7, 9-10, 41-42 (1972) (separate subcategory of mental retardation caused by cultural deprivation) and Cytryn & Lourie, *supra* note 280, at 820-21, 834-36 (same) and E.E. Doll, *Historical Survey of Research and Management of Mental Retardation in the United States*, in READINGS ON THE EXCEPTIONAL CHILD 47, 48 (E. Trapp ed. 1962) (environment may cause subclass of retardation) with E.A. Doll, *supra* note 282, at 217 (limiting categories of mental retardation to those of hereditary or pathological origin).

285. *See, e.g.*, *State v. Hall*, 176 Neb. 295, 310, 125 N.W.2d 918, 927 (1964) (on basis of low intelligence and suggestibility of defendant, death sentence reduced to life imprisonment); OHIO REV. CODE ANN. §§ 2947.24(A), 5125.011 (Page, 1975) (defective delinquent and civil commitment statutes; retardation defined as low intelligence and inadequate social adjustment); VA. CODE § 37-1-1(13) (1976) (defective delinquent statute; retardation comprises subaverage intellect, impaired adaptive behavior). Recently, the Ohio Supreme Court, interpreting that state's mitigating factor based on mental deficiency, offered a purportedly broad definition that nevertheless excludes behavioral symptoms:

Mental deficiency is consistently defined to mean a low or defective intelligence. Construing the term broadly, a deficiency may be severe or mild, and may be hereditary or caused by a brain defect, disease, or injury, or whatever other condition might cause subnormal intelligence. But it does not include the emotional and behavioral abnormalities claimed to exist by the defense.

*State v. Bayless*, 48 Ohio St. 2d 73, 96, 357 N.E.2d 1035, 1050-51 (1976). The United States Supreme Court soon may have occasion to scrutinize this definition and its application in two cases. *See State v. Lockett*, 49 Ohio St. 2d 48, 66-67, 358 N.E.2d 1062, 1074 (1976) (rejecting defendant's claim of mental deficiency based on dull-normal I.Q., susceptibility to undue influence, and participation in methadone treatment), *cert. granted*, 98 S. Ct. 261 (1977) (No. 76-6997); *State v. Bell*, 48 Ohio St. 2d 270, 280, 358 N.E.2d 556, 565 (1976) (though minor is not per se "mentally deficient" within meaning of statute, defendant's age may be relevant to mental deficiency), *cert. granted*, 97 S. Ct. 2971 (1977) (No. 76-6513); note 103 *supra*. The *Lockett* and *Bell* cases also illustrate the difficulty courts have experienced in assessing the mitigatory potential of individuals with dull-normal or borderline intelligence. *Compare State v. Lockett*, 49 Ohio St. 2d at 66-67, 358 N.E.2d at 1074 (no mental deficiency despite dull-normal I.Q. and suggestibility) and *State v. Bell*, 48 Ohio St. 2d at 277-80, 358 N.E.2d at 563-65 (no mental deficiency despite tender age and behavioral adaptability difficulties) with *Meeks v. State*, 336 So. 2d 1142, 1143 (Fla. 1976) (dull-normal intelligence and youth comprise mitigating factor) and *Commonwealth v. Green*, 396 Pa. 137, 148, 151 A.2d 241, 247 (1959) (same).

analysis of the mitigatory potential of retardation, a broad-based approach to mental retardation is utilized, reflecting the prevailing views of both psychiatric and legal communities.<sup>286</sup>

*Expiation.* Many of the antisocial actions of the mental retardate stem from an impulsive reaction against the painful awareness, hammered home by frustration, failure, and humiliation, of the "cruel trick that biology has played on him."<sup>287</sup> Indeed, opinions in some death penalty cases have displayed a strong sense of compassion that reflects an awareness of the mental retardate's internal suffering.<sup>288</sup> To the extent that such suffering can be proved, it undercuts the expiation justification for capital punishment and should function as a mitigating circumstance.<sup>289</sup>

*Vengeance.* Mental retardation raises questions concerning potential impairment of all the psychological predicates to responsibility.<sup>290</sup> Although some support exists for the proposition that mental retardation is per se proof of a lack of criminal responsibility,<sup>291</sup> the

286. In essence, this approach adopts the official definition of the American Association of Mental Deficiency (AAMD), which states that "[m]ental retardation refers to sub-average general intellectual functioning which originated during the developmental period and is associated with impairment in adaptive behavior." See Heber, *supra* note 283, at 499.

287. W. BROMBERG, *supra* note 282, at 202; see Address by C. H. Martin at the National Institute on Crime and Delinquency (July 24, 1962), *quoted in* B. BROWN & T. COURTLESS, *THE MENTALLY RETARDED OFFENDER* 22-24 (report submitted to President's Commission on Law Enforcement and the Administration of Justice, 1967) (consciousness of being different in some way may be responsible for feelings of inferiority, frustration, and resentment in the mildly retarded).

The instinctive, aggressive, and hostile impulses of the retardate are the expression of an attempt to deal with certain life situations. This attempt does not represent any special or pathological characteristic peculiar to the retarded individual, but rather the normal and healthy tendency in every individual to maintain his worth as a human being. M. STERNLICHT & M. DEUTSCH, *supra* note 284, at 62.

288. See *Woods v. State*, 214 Ga. 546, 546, 105 S.E.2d 896, 897 (1958) (jury instructed that weakmindedness, though no defense to the crime, may be grounds for a recommendation of mercy); *Commonwealth v. Elliott*, 371 Pa. 70, 78-84, 89 A.2d 782, 786-89 (1954) (Musmanno, J., dissenting) (reciting circumstances affecting defendant that should "soften the blow of the iron hammer of retribution").

289. See notes 231-37 *supra* and accompanying text.

290. See notes 238-49 *supra* and accompanying text.

291. Legal rules for determining responsibility developed primarily in cases involving "mental disease." See *M'Naghten's Case*, 8 Eng. Rep. 718, 722-23 (1843) (person asserting insanity defense must prove at time of crime he was laboring under such defect of reason or disease of mind as not to know nature and quality of act, or that what he did was wrong). See generally A. GOLDSTEIN, *supra* note 236, at 223-26. Today, mental health professionals distinguish "mental disease" from the "mental defects" underlying retardation and have suggested separate rules for defendants suffering from the latter affliction. R. WOODY, *supra* note 278, at 17; Hinkle, *Criminal Responsibility of the Mentally Retarded*, 65 AM. J. OF MENTAL DEFICIENCY 434, 435-36 (1960). In England, the Mental Deficiency Act of 1913, provided a special defense comparable to the insanity defense for the feeble-minded. 3 & 4 Geo. V, c. 28, § 8, *discussed in* S. GLUECK, *supra* note 223, at 332 & n.1, 335 n.4. Until recently Virginia also had a

consensus among the courts that have considered the argument is to apply to mental retardates the cognitive and volitional standards discussed earlier for the insanity and diminished capacity defenses.<sup>292</sup> Moreover, despite their intellectual impairment, mental retardates rarely satisfy even the cognition-based insanity test<sup>293</sup> because, at least in some very rudimentary sense, they do understand the difference between right and wrong.<sup>294</sup> Nonetheless, even in cases in which the retardate is too cognitively aware to meet the legal test of insanity, it is recognized that the retardate's level of cognition and volition is often so far below average that the death penalty is inappropriate.<sup>295</sup>

There are three ways in which the retardate's impaired intelligence puts him at a disadvantage in appreciating the significance of his acts and in conforming those acts to societal norms. First, the retardate's intellectual defect may manifest itself as an inability fully to understand legal rules,<sup>296</sup> or the rationale underlying them. Thus,

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statute providing that the feeble-minded could assert the same defenses as insane persons. VA. CODE ch. 46, § 1094 (1942) (recodified in part, VA. CODE § 37.1-127 (1970) (repealed 1976); see *Jessup v. Commonwealth*, 185 Va. 610, 617-19, 39 S.E.2d 638, 641-42 (1946) (reversing conviction of defendant with I.Q. of 58 because statute not applied). Other American jurisdictions have refused to view mental retardation, except in its most severe forms, as per se proof of lack of responsibility. See *Hinkle, supra* at 436 (insanity defense not applied absent gross idiocy). Moreover, American systems consistently have rejected the argument that an adult defendant's severely stunted mental growth should qualify him for the common law rule that children between the ages of 7 and 14 are presumed criminally irresponsible. In *State v. Schilling*, 95 N.J.L. 145, 112 A. 400 (1920), the court dismissed the mental age argument of a 28-year-old defendant with a mental age of only 11, noting that the presumption of irresponsibility of adolescents stemmed solely from their "tender years." *Id.* at 148, 112 A. at 402; see *Edgerson v. State*, 302 So. 2d 556, 558 (Ala. Crim. App. 1974) (actual age, not mental age, controls application of common law presumptions as to capacity to commit crime); *People v. Perry*, 195 Col. 623, 638-39, 234 P. 890, 896-97 (1925) (same); *Commonwealth v. Stewart*, 255 Mass. 9, 13, 151 N.E. 74, 74-75 (1926) (same); cf. 4 W. BLACKSTONE, *supra* note 143, at \*23 (as to children over age 14 "the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment.").

292. See generally notes 238-49 *supra* and accompanying text.

293. See notes 242 & 291 *supra* and accompanying text.

294. See *State v. Schilling*, 95 N.J.L. 145, 148, 112 A. 400, 402 (1920) (28 year-old adult presumed to have capacity to distinguish right from wrong); *State v. Hall*, 176 Neb. 295, 310, 125 N.W.2d 918, 925 (1964) (mentally defective offender with mental age of five- to seven-year old who understood the difference between right and wrong presumed legally sane).

295. See, e.g., *State v. Behler*, 65 Idaho 464, 475-76 146 P.2d 338, 343 (1944) (sentence reduced to life imprisonment because person with pronounced subnormal mind not held to normal standard of accountability); *State v. Hall*, 176 Neb. 295, 310, 125 N.W.2d 918, 925 (1964) (sentence reduced from death to life imprisonment because defendant low-grade moron disposed to follow others); *Commonwealth v. Green*, 396 Pa. 137, 148, 151 A.2d 241, 247 (1959) (death penalty vacated because defendant's youth and dull-normal intelligence not considered by sentencing judge).

296. See R. TREDGOLD & K. SODDY, *supra* note 280, at 251.

the retardate not only may be less affected by the knowledge that the police and his peers will disapprove of a criminal act, but also may be less aware of the harm that might follow from that act.<sup>297</sup> Second, the retardate is more prone to commit a crime than a normal person because he misperceives surrounding circumstances and consequently tends to react immediately and violently to the urges of the moment.<sup>298</sup> For example, a situation that may appear harmless to a person of normal intellect to the retardate will justify a swift and sure reaction in "self-defense."<sup>299</sup> Third, retardates' native suggestibility may lead them to participate in illegal activity out of a desire to please their cohorts, and so may reflect adversely on the existence of criminal intent.<sup>300</sup>

### *Subjective Deterrence.*

### Retardates' behavioral disorders and

297. In this context, Tredgold and Soddy offer the example of an imbecile who cut off a sleeping man's head because he thought it would be fun to see what his victim would say when he woke up and found that his head was missing. Using the *M'Naghten* terms, the authors note that the retardate may evince an understanding of the "nature" of the act—that it is forbidden—without fully understanding its "quality." R. TREDGOLD & K. SODDY, *supra* note 280, at 252. See also M. STERNLICHT & M. DEUTSCH, *supra* note 284, at 80 (although individual of normal intelligence might feel some pangs of conscience before he decides to act in an antisocial manner, retarded individual has only dim awareness that act might not be desirable because of inability to foresee future consequences).

298. See, e.g., W. BROMBERG, *supra* note 282, at 202 (noting retardates' tendency to "react in a blinding flash of vengeance" against frustration and humiliation); S. GLUECK, *supra* note 223, at 334-35 (feble-mindedness, especially when accompanied by psychosis, may lead to serious crimes of violence due to actor's defective control of instinctive behavior); M. STERNLICHT & M. DEUTSCH, *supra* note 284, at 58 (defect in organization of ego results in failure of defense mechanisms of repression and inhibition, with result that retardate has difficulty developing control of instinctive aggressive and hostile impulses emanating from the Id).

299. Put most simply, poor judgment usually accompanies a weak intellect:

[A] retarded individual is especially prone to committing deviant acts because he will be subject to weak and ineffective functioning not only in the realm of conscience and values but in the realm of judgment and common sense as well. It is the latter deficit, in fact, which creates perhaps the more immediate and pervasive of the retardate's problems in the area of deviant and antisocial conduct.

M. STERNLICHT & M. DEUTSCH, *supra* note 284, at 81.

300. See *State v. Hall*, 126 Neb. 295, 310, 125 N.W.2d 918, 927 (1964) (reducing death sentence to life imprisonment because defendant was low-grade moron disposed to follow others); W. BROMBERG, *supra* note 282, at 202; S. GLUECK, *supra* note 223, at 334-35; R. TREDGOLD & K. SODDY, *supra* note 280, at 257; see also MODEL PENAL CODE §§ 210.6(4)(e)-6(4)(f) (Proposed Official Draft 1962) (mitigating circumstance present if defendant was accomplice and participation in homicidal act was relatively minor or if defendant acted under domination of another person). But see *State v. Lockett*, 49 Ohio St. 2d 48, 66-67, 358 N.E.2d 1062, 1074 (1976) (dull-normal defendant, although subject to undue influence by others, did not show sufficient mental deficiency to preclude imposition of capital punishment), *cert. granted*, 98 S. Ct. 261 (No. 76-6997); *State v. Bell*, 48 Ohio St. 2d 270, 280, 358 N.E.2d 556, 564-65 (1976) (same), *cert. granted*, 97 S. Ct. 2971 (1977) (No. 76-6513).

intellectual deficiencies suggest that they are largely immune from the threat of punishment. Their susceptibility to impulsive conduct makes it unlikely that they will commit the fully contemplated and coolly calculated crime that the plurality in the *July 2 Cases* postulated is indicative of deterrability.<sup>301</sup> Further, although capable of understanding that the law forbids a certain act, retardates may not fully understand the rationale underlying the law and thus may be unaffected by the moral and legal opprobrium that normally accompanies the criminal sanction.<sup>302</sup> This latter problem is exacerbated by the deficient's reduced ability to "project into the future," which in turn reduces the likelihood that he will appreciate and be tempered by the prospect of punishment,<sup>303</sup> or that he will respond differently based on variations in the degree of punishment.

*Objective Deterrence.* Although the behavior of retardates may in some respects be distinguished from that of mentally normal individuals, the distinction usually is based on incomplete human development rather than on aberrant or "inhuman" characteristics. Qualitatively, therefore, retardates generally will not appear so different from other members of the population that their capital punishment could not serve an educational function.<sup>304</sup> Combined with the difficulty of assessing the objective impact of mitigatory decisions, this moderate degree of behavioral distinctness attending the retardate personality holds out little mitigatory value.<sup>305</sup>

Three of the four factors, expiation, vengeance, and subjective deterrence, offer substantial mitigatory potential to the retardate. Moreover, the retardate personality may also evidence other potentially mitigating characteristics, including mental illness<sup>306</sup> and alcoholism.<sup>307</sup> Taken together, these mitigating circumstances present

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301. *Gregg v. Georgia*, 428 U.S. at 186; see note 298 *supra* and accompanying text.

302. See note 297 *supra* and accompanying text.

303. See M. STERNLICHT & M. DEUTSCH, *supra* note 284, at 80; Grigg, *Criminal Behavior of Mentally Retarded Adults*, 52 AM. J. OF MENTAL DEFICIENCY 370, 371, 374 (1948).

304. Indeed, judges, juries, and even defense counsel often do not realize that a defendant is retarded. For example, when a retardate is testifying truthfully, the jury may erroneously attribute his confusion under the pressure of effective cross-examination to lack of truthfulness. See Allen, *supra* note 282, at 25. This problem makes it especially imperative that juries be instructed on the mitigatory theories of mental retardation. See note 275 *supra*.

305. See notes 265-66 *supra* and accompanying text.

306. See M. STERNLICHT & M. DEUTSCH, *supra* note 284, at 87.

307. See Grigg, *supra* note 303, at 374. Due to their suggestibility retardates are also more likely to confess than normal defendants. See *Dover v. State*, 207 So. 2d 296, 300 (Miss. 1968) (moderate mental defective with I.Q. of 60 did not knowingly and intelligently waive privilege against self-incrimination); *Harvey v. State*, 207 So. 2d 108, 117 (Miss. 1968) (confession of mental retardate deemed involuntary). Moreover, due to their intellectual deficiencies, they may be less able to assist counsel and less likely to appear credible to juries. See Inkes & Perretta,

a compelling case for reduction of a death sentence that should be overcome only by substantial aggravating conditions. It is important to note, however, that some of these conditions are not likely to cumulate in any individual and may even be mutually exclusive,<sup>308</sup> so that the mitigatory potential of mental retardation alone remains a question for which the final answer rests on an examination of the circumstances of each case.

#### THE MITIGATORY POTENTIAL OF SOCIOPATHY

Although the subject of considerable literary, historical, and medical speculation, the sociopathic or psychopathic personality has defied precise definition among mental health professionals.<sup>309</sup> During the long and often confusing evolution of these medical concepts, legislators and legal commentators have attempted with varying degrees of success to keep legal standards of sociopathy consistent with the changing understandings of mental health professionals.<sup>310</sup>

Apparently relying at least in part on past understandings of mental health professionals, state legislators in attempting to delineate the condition of sociopathy for special sentencing statutes typically have defined the condition in a general and simplistic manner. Washington's statute, for example, defines the psychopathic condition as follows:

[Psychopathy is] the existence in any person of such hereditary, congenital or acquired condition affecting the emotional or volitional rather than the intellectual field and manifested by anomalies of such character as to render

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*Legal Dilemmas of Mental Retardation*, in DIMINISHED PEOPLE 107, 115-16 (N. Bernstein ed. 1971) (retardates' deficiency impairs ability to exercise legal rights after arrest; retardate likely to waive right to remain silent); note 304 *supra*. These consistent disadvantages in presenting a defense suggest a further mitigating factor in the case of retardates.

308. For example, a slightly retarded offender might be particularly subject to frustration, failure, and aggression that bear on expiation, subjective deterrence, and volitional responsibility, yet be relatively responsible in a cognitive sense. Address of C. H. Martin, *quoted in* B. BROWN & T. COURTLESS, *supra* note 287, at 22-24.

309. The term "psychopath" was traditionally used to describe sociopaths. In 1952 the American Psychiatric Association manual replaced "psychopath" with "sociopath" to emphasize the social maladjustments of its victims. Rabin, *Psychopathic (Sociopathic) Personalities*, in LEGAL AND CRIMINAL PSYCHOLOGY 274 (H. Toch ed. 1961). See W. BROMBERG, *supra* note 282, at 58-59 (history of experiments on sociopaths); H. CLECKLY, THE MASK OF SANITY 360 (4th ed. 1964) (identifies Dostoevsky's senior Karamazov as sociopath).

310. See COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1287 (A. Freedman, H. Kaplan & P. Sadlock eds. 1975). See generally Note, *The Plight of the Sexual Psychopath: A Legislative Blunder and Judicial Acquiescence*, 41 NOTRE DAME LAW. 550-55 (1966); Note, *supra* note 275.

satisfactory social adjustment by such person difficult or impossible.<sup>311</sup>

Faced with the inadequacy in practice of such amorphous and potentially overinclusive definitions, legal commentators have shunned comprehensive definitions and instead have described sociopaths only by means of a series of characteristics.<sup>312</sup> Thus, sociopaths evidence four personality traits that together might be summarized as a lack of conscience or super ego. The most notable sociopathic characteristic is a severe disturbance or virtual absence of moral judgment tied to the sociopath's inability to adhere to rules or to experience guilt; linked to this absence of judgment are egocentric concerns for personal needs, general inability to plan for the future, and inability to maintain affectional ties.<sup>313</sup> These four characteristics have traditionally been employed as the legal indicia of sociopathy.<sup>314</sup>

311. WASH. REV. CODE ANN. § 71.06.010 (1975); see MD. ANN. CODE art. 31B, § 5 (1976) (defective delinquent defined as individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society); Note, *supra* note 310, at 555 (citing some statutes in effect in 1966).

312. See Rabin, *supra* note 309, at 276 (calling definition a "wastebasket" classification). In addition to covering too many offenders, these open-ended definitions mask disagreement among mental health professionals and fail to provide any guidance in the borderline situations in which such guidance is particularly needed. See REPORT OF THE NEW JERSEY COMMISSION ON THE HABITUAL SEX OFFENDER 37 (1950) (psychiatrists widely disagree over definition of psychopaths); Bowman & Rose, *A Criticism of the Current Usage of the Term Sexual Psychopath*, 109 AM. J. PSYCHIATRY 177, 179 (1952) (term sexual psychopath used too loosely to be meaningful); Panel Discussion, *The Sociopathic Criminal Offender: What to Do With Him*, 34 U. CIN. L. REV. 1, 5 (1965) (term sociopath applied to all individuals who are unable to make acceptable and satisfactory adjustment to the prevailing social and moral milieu); Note, *supra* note 275, at 431-32 (reviewing literature that attempts to define sociopathy by use of characteristics).

313. See A. CHAPMAN, TEXTBOOK OF CLINICAL PSYCHIATRY: AN INTERPERSONAL APPROACH 221-24 (2d ed. 1976); H. CLECKLY, *supra* note 309, at 370-72 (inability to feel guilt manifested by frequent denials of wrongdoing); W. MCCORD & J. MCCORD, THE PSYCHOPATH, AN ESSAY ON THE CRIMINAL MIND 8, 53 (1964) (sociopaths unstoppable by any abstract rule; impulsive); Rabin, *supra* note 309, at 278-80 (sociopaths do not internalize "thou shalts" and "thou shalt nots"); Robins, *Antisocial and Dysocial Personality Disorders*, in TEXTBOOK OF PSYCHIATRY, *supra* note 278, at 279, 955. These traits of the sociopathic personality, particularly the inability to follow plans, are an ultimate irony of the sociopaths' existence: Despite their intelligence and their willingness to violate moral codes, they organize their behavior so that they rarely win any of the successes recognized by society. H. CLECKLY, *supra* note 309, at 400.

314. See Director v. Daniels, 243 Md. 16, 34-37, 221 A.2d 397, 408-09 (1966) (reliance on psychiatric text to give content to term "psychopath"); Palmer v. State, 215 Md. 142, 146-48, 137 A.2d 119, 122-23 (1957) (reliance on psychiatric definition of sociopathy to illustrate emotional imbalance as a mitigating factor), cited with approval in Sas v. Maryland, 295 F. Supp. 389, 396-97 (D.Md. 1969); cf. State v. Richmond, 114 Ariz. 186, 197-98, 560 P.2d 41, 52-53 (1976) (citing psychiatric texts to define sociopathy), cert. denied, 97 S. Ct. 2988.

While the legal definition seems to have remained unchanged, the mental health profession's concept of the psychopathic personality has evolved radically over the past twenty-six years. The most important development has been the isolation of a new category of psychopathy, denominated "antisocial personality."<sup>315</sup> Researchers studying the antisocial personality have uncovered evidence of certain identifiable childhood characteristics and biological abnormalities, making possible the development of a more objective set of symptomatic characteristics that distinguish these sociopaths not only by their antisocial behavior but also by their shared developmental and biological traits.<sup>316</sup> Because in the death penalty context modern legal definitions should recognize theoretical advances,<sup>317</sup> the following subsection will apply the four factor analysis to individuals who fall within either the traditional legal definition of sociopathy or the modern concept of antisocial personality.

*Expiation.* Because sociopaths generally do not exhibit behavioral patterns normally associated with insane or mentally unbalanced individuals, they are unlikely to evoke pity or compassion.<sup>318</sup> As a result, sentencing authorities may be reluctant to

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315. See L. ULLMAN & L. KRASNER, A PSYCHOLOGICAL APPROACH TO ABNORMAL BEHAVIOR 544 (2d ed. 1975). In 1952 the American Psychiatric Association Diagnostic and Statistical Manual dispensed with the term psychopath and referred to a category of personality disorders called sociopathic personality disturbance that included individuals who were "ill primarily in terms of society and of conformity with the prevailing cultural milieu." The subcategories of this disturbance were sexual deviation, addiction, antisocial reaction, and dyssocial reaction. *Id.* In 1968, antisocial reaction was relabeled antisocial personality and included within a category of personality disorders separate from the sociopathic personality disturbance. AMERICAN PSYCHIATRIC ASSOCIATION, DSM II, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS ¶ 301.7 (1968). Because many defendants commonly referred to as sociopaths may fit the more precise definition of antisocial personality, this article will address both conditions. See note 324 *infra*.

316. See AMERICAN PSYCHIATRIC ASSOCIATION, DSM II, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS ¶ 301.7 (1968) (mere history of repeated legal or social offenses not sufficient to justify diagnosis); COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, *supra* note 310, at 1287-97 (stressing importance of objective symptomatology and referring to genetic factors, electroencephalograph abnormalities, and the presence of childhood disorders). See generally L. ROBINS, DEVIANT CHILDREN GROWN UP: A SOCIOLOGICAL AND PSYCHIATRIC STUDY OF SOCIOPATHIC PERSONALITY (1966).

317. See *Blocker v. United States*, 274 F.2d 572, 572-73 (D.C. Cir. 1959) (*per curiam*) (granting new trial because government's psychiatric expert who testified at trial and defined mental disease not to include sociopathy redefined mental disease to include sociopathy in subsequent, unrelated trial). The Supreme Court, however, recently denied review of a case in which a capital defendant was denied mitigatory treatment despite his sociopathic condition. *State v. Richmond*, 114 Ariz. 186, 199, 560 P.2d 41, 52 (1976), *cert. denied*, 97 S. Ct. 2988 (1977).

318. See S. GLUECK, *supra* note 223, at 382 (noting the usual absence of symptoms that juries accept as evidence of insanity); Note, *supra* note 275, at 435 (sociopath does not appear pathetic, mentally unbalanced, helpless to avoid or combat his affliction, or incapable of making his way into

believe that sociopaths suffer from the torment of their calamity that is necessary to fit a mentally disordered offender within the expiation qualification to retributive punishment.<sup>319</sup>

*Vengeance.* Most psychologists and legal commentators agree that sociopaths possess the cognitive ability to distinguish between right and wrong and probably have a full understanding of the nature of their actions.<sup>320</sup> The more persuasive argument for mitigation in the case of the sociopath is based largely on modern formulations of the volitional element of the responsibility factor—impaired ability to conform actions to societal rules.<sup>321</sup> The extreme impulsiveness recognized as central to the character of the sociopath<sup>322</sup> arguably brings these persons within the American Law Institute's standard of a defendant who "lacks substantial capacity . . . to conform his conduct to the requirements of the law" and thus is less responsible for criminal conduct.<sup>323</sup> However, in 1962 the ALI specifically excluded sociopaths from that standard because they differ from normal persons only quantitatively rather than qualitatively, and because a symptomatic diagnosis of sociopathy does not

society). If, however, it is shown that sociopathy has biological origins, the potential for pity, and for expiatory mitigation, would be enhanced. See note 316 *supra* and accompanying text.

319. See *Smith v. State*, 540 S.W.2d 693, 696-97 (Tex. Crim. App. 1976) (remorseless attitude of sociopathic offender constituted continuing threat to society and qualified as aggravating factor).

320. See H. DAVIDSON, *FORENSIC PSYCHIATRY* 31-32 (2d ed. 1965) (psychopaths' attempts to explain, neutralize, or escape from offenses by evasive explanations or flight indicate knowledge of distinction between right and wrong); S. GLUECK, *supra* note 223, at 382; Note, *supra* note 275, at 432. A few psychiatrists have reached a contrary conclusion, contending that the sociopath cannot be said to know the difference between right and wrong because sociopaths never actually *feel* wrong through experience. See E. KAHN, *PSYCHOPATHIC PERSONALITIES* 348 (1931); Seeman, *Behavioral Science, M'Naghten, and the Sociopathic Offender*, 34 U. CIN. L. REV. 58, 61-62 (1965).

321. See notes 242-49 *supra* and accompanying text.

322. See W. BROMBERG, *supra* note 282, at 75-76; W. McCORD & J. McCORD, *supra* note 313, at 16-17, 27. William Cook, probably the most thoroughly studied sociopath, has been described as "so impulsive [and] so warped that every frustration resulted in explosive, murderous aggression." *Id.* at 5. Impulsiveness has also been introduced into statutory definitions of sociopathy. See MINN. STAT. ANN. § 526.09 (West 1975) (impulsiveness of behavior); VT. STAT. ANN. tit. 18, § 8501(a) (Supp. 1977) (lack of power to control impulses).

323. MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962). The "product of a mental disease or defect" standard articulated in *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954), also seems to favor the inclusion of sociopaths. Arguably Durham himself was a sociopath. W. McCORD & J. McCORD, *supra* note 313, at 179. The District of Columbia Circuit subsequently ruled that the sociopathic condition was sufficient to require the submission of the issue of responsibility to the jury. See *Blocker v. United States*, 274 F.2d 572, 572-73 (D.C. Cir. 1959) (*per curiam*) (jury should determine criminal responsibility of alleged psychopath); *In re Rosenfield*, 157 F. Supp. 18 (D.D.C. 1957) (same).

explain the causes of the abnormality.<sup>324</sup> Even if courts choose to follow this rule,<sup>325</sup> the vitality of the exclusion as applied to those sociopaths who suffer from antisocial personality is at best dubious in light of evidence that they may be biologically and developmentally distinguishable from other defendants.<sup>326</sup> Hence, courts that are willing to accept the results of current psychiatric research may be expected to accord significant mitigatory potential to reduced culpability.

*Subjective Deterrence.* Sociopathy has greater mitigatory potential under the important factor of subjective deterrence. Apart from the widely recognized view, not relevant to death penalty cases, that sociopaths do not learn from punishment,<sup>327</sup> an analysis of sociopathic characteristics indicates that the threat of sanction does not alter their conduct. Sociopaths' inability either to suppress immediate gratification in favor of longterm needs or to conform to the basic moral codes of the society<sup>328</sup> is inconsistent with the notion that the fear of penalty can alter their conduct. Commentators, therefore, have recognized the impropriety of justifying the sociopath's punishment on grounds of deterrence.<sup>329</sup> A few even have suggested that the threat of punishment might be counterproductive because it encourages some sociopaths to engage in criminal activity.<sup>330</sup>

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324. MODEL PENAL CODE § 4.01(2) (Proposed Official Draft 1962); see MODEL PENAL CODE § 4.01, Comment (Tent. Draft No. 4, 1955). This provision has been criticized as an inadvisable effort to bar sociopaths from the insanity defense, and praised as a necessary compromise to the broadening of the insanity defense. Compare A. GOLDSTEIN, *supra* note 236, at 88 (psychopaths should be included in definition) with Welchsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 376 & n.23 (1955) (sociopaths should be excluded). The psychiatric profession responded to the ALI's concerns in 1968 by removing from its "sociopathic personality" classification all disorders related solely to the inability to be socialized and including them in a category of conditions "without manifest psychiatric disorder." See L. ULLMAN & L. KRASNER, *supra* note 315, at 544 (persons normal in terms of subculture but abnormal in terms of dominant social group reclassified as without psychiatric disorder).

325. See A. GOLDSTEIN, *supra* note 236, at 88 (noting jurisdictions that follow the ALI rule); cf. Kuh, *A Prosecutor Considers the Model Penal Code*, 63 COLUM. L. REV. 608, 626 (1963) (contending that most psychopaths would not be excluded under the Model Penal Code because they evidence characteristics other than repeated criminal behavior).

326. See note 316 *supra* and accompanying text.

327. See H. WEIHOFEN, *supra* note 170, at 123-24 (under traditional tests psychopathic defendants must be held responsible and punishable even when, as usual, it may be medically certain that punishment can have no therapeutic effect). But see L. ROBINS, *supra* note 316, at 958 (finding some evidence that conditioning potential of psychopaths increases with age).

328. See notes 313-14 *supra* and accompanying text.

329. See Note, *supra* note 275, at 436-37 & n.58 (psychopath will commit criminal acts even if he knows he may be required to serve a prison term).

330. See W. McCORD & J. McCORD, *supra* note 313, at 31.

*Objective Deterrence.*

Because sociopathic offenders are not easily distinguished from normal offenders, and because of the resulting fear that any offender could attempt to avoid responsibility by claiming to be a sociopath, it is unlikely that a court will view sociopaths as so different from members of the general population that their exemplary punishment will not serve to deter others.<sup>331</sup> New evidence pointing to objective distinctions between sociopaths suffering from antisocial personality and other criminal defendants, however, could generate change because dissemination of this information should serve to heighten public awareness of differences between antisocial and normal personalities, thereby diminishing the need for exemplary punishment of persons with antisocial personalities. Nonetheless, problems of proof will continue to plague efforts to establish this mitigating factor.

The mitigatory potential of sociopathy may be weaker than the mitigatory potential of retardation due to the absence of expiation. Nevertheless, if the theory is accepted that sociopaths who suffer from antisocial personality are biologically abnormal, at least these persons should receive mitigatory consideration because of the reduced vitality of the important vengeance and subjective deterrence justifications for punishment. Such a conclusion does not indicate, however, that all sociopaths or even all antisocial personalities would be exempted from the death penalty; because of the callousness and destructiveness inherent in the sociopath's behavior, the presence of aggravating factors is often a real possibility.<sup>332</sup>

### CONCLUSION

In the *July 2 Cases*, the Supreme Court for the first time firmly concluded that the death penalty could coexist with the eighth amendment proscription of cruel and unusual punishment. By the result reached in two of the cases, however, the Court also affirmed that in many modes of administration the ultimate sanction does not satisfy that constitutional requirement.<sup>333</sup> Both of these holdings were the product of a consistent view of the doctrinal framework of the

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331. See Note, *supra* note 275, at 435 (psychopaths appear to be nearly average persons, of varying degrees of intelligence, as well able to manage their own affairs and conduct themselves in society; their anti-social actions appear "bad" to others who do not recognize that behavior results from mental illness).

332. See *Smith v. State*, 540 S.W.2d 693, 696-97 (Tex. Crim. App. 1976) (remorseless attitude of sociopathic offender constituted continuing threat to society and qualified as an aggravating factor).

333. See *Roberts v. Louisiana*, 428 U.S. at 336 (mandatory death statute violates eighth and fourteenth amendments); *Woodson v. North Carolina*, 428 U.S. at 305 (same).

eighth amendment advanced by the plurality of Justices Stewart, Powell, and Stevens. At base, that framework insists upon death sentencing systems that are consistent with "the evolving standards of decency that mark the progress of a maturing society."<sup>334</sup> From that base rise two requirements: that the death penalty be consistent with "public attitudes" toward punishment, and that the system accord with "human dignity." This latter requirement also has two parts—one substantive, requiring that the punishment be penologically justified and proportionate to the offense committed, and one procedural, requiring nonarbitrary administration of punishment through the guided and individually oriented discretion of the sentencing authority.

This article has focused primarily on this latter, guided individualization requirement. It has concluded that satisfaction of that requirement mandates first that no offender be executed until the sentencing authority considers the full range of factors mitigating the propriety of that penalty; second, in cases of jury sentencing, the court must take special precautions to instruct the jury on the theory of the defendant's mitigatory case. More specifically, this article has analyzed the dictates of guided individualization in the case of the mentally disordered defendant. It has concluded that the public attitudes and penological justifications necessary to support a constitutional death penalty system support the mitigatory consideration of mental abnormality, at least if it inspires compassion for the defendant, dilutes his responsibility, impedes his ability to react to the threat of punishment, or impairs the educative impact of his execution on the public.

In these conclusions lies the apparent lesson that the standards of decency marking the progress of a maturing society evolve and become ensconced in legal procedures with varying degrees of dispatch. Thus, it took almost a century for the occasionally expressed view that the law's "external standards [should] not take account of incapacities, unless the weakness is so marked as to [establish] madness,"<sup>335</sup> to evolve into today's unequivocal view that such incapacities should at least moderate punishment. By contrast, it took only five years for Justice Harlan's statement that death sentencing guidelines could embody only "meaningless 'boiler-plate'" to evolve into the view of the plurality in the *July 2 Cases* that such guidelines are the most basic prerequisite to constitutional death sentencing.

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334. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

335. O. W. HOLMES, *THE COMMON LAW* 48 (1881).

Moreover, this uncertain durability of the announced standards of contemporary decency to any stage of a society's development suggests a more important lesson: If death sentencing authorities are unwilling or unable to apply the mitigation standards that have evolved into constitutional edicts—and, in the context of disordered offenders, the intractability of jurors suggests that they may be<sup>336</sup>—must not the standard that now permits the death penalty give way to a standard that forbids it?

For now, the Supreme Court has declined to recognize this possibility, although not without acknowledging the underlying problems. Instead, it has developed its own approach based on two premises: that eventually the rule of law can be made to prevail in each imposition of the death sentence; and that meanwhile, in those cases in which it has not at first prevailed, its success can be assured upon appellate review. Should these premises be undermined by the difficulty of administering any standards, no matter how unequivocally evolved, we are left where we began—with Professor Kalven's relentless questions:

What does it mean about the nature of the death penalty that either it cannot . . . be administered through a set of rules guiding its allocation or that no responsible organ of government is willing to take on the burden of allocating it? What, that is, does it mean about the death penalty that its administration must depend so heavily on the quality of mercy?<sup>337</sup>

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336. See note 275 *supra*.

337. Kalven, *supra* note 2, at 25.