The Requirement of Death: Mandatory Language in the Pennsylvania Death Penalty Statute

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INTRODUCTION**

American death penalty statutes1 in the post-Gregg v. Georgia2

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** I wish to thank my colleague Robert Taylor for his helpful criticism, and all of the student volunteers at the Allegheny County Death Penalty Project. I would also like to thank my assistant, Judith Olmstead, for her extraordinary efforts in researching this article.


era can be divided into two types, mandatory and permissive.\textsuperscript{3} All American death penalty statutes guide the sentencer's discretion in various ways. But upon the satisfaction of the conditions for imposing the death penalty the sentencer in some states is required\textsuperscript{a} to return a sentence of death,\textsuperscript{b} whereas in other states the sen-

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\item as violations of the eighth and fourteenth amendments. See Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). Gregg is considered the lead case because the controlling opinion of Justices Stewart, Powell, and Stevens discussed the facial constitutionality of the death penalty itself. See 428 U.S. at 168-87. This controlling block of three justices wrote the opinions in all five cases which are regarded as the authoritative expressions in those cases. See, e.g., Commonwealth v. Moody, 476 Pa. 223, 230-31, 382 A.2d 442, 445-46, cert. denied, 438 U.S. 914 (1978).
\item This is not to say that there are not other significant differences among state death penalty statutes. For a state by state listing of some of the other differences, including the role of the judge, the burden of proof and the requirement of jury unanimity, see Gilmer, Deciding Who Dies, 129 U. Pa. L. Rev. 1, 101 app. (1980) [hereinafter cited as Gilmer]. Other differences may also be of constitutional magnitude. See id. at 39-74 (constitutional requirement of jury sentencing at the sentencing hearing); Comment, Capital Punishment and the Burden of Proof: The Sentencing Decision, 17 CAL. W.L. REV. 316 (1981) (beyond a reasonable doubt should be the required standard of proof at all stages of death penalty proceedings) [hereinafter cited as Burden of Proof].
\item In this article the term “sentencer” will be used to refer to sentencing by jury or by judge, without intending an implication that a statutory requirement of sentencing by a judge or judges is constitutional. See Gilmer, supra note 3, at 3 n.5.
\item It is the sense of requirement that I mean to identify by the use of the term “mandatory.” I do not mean that the Pennsylvania statute is, for purposes of assessing constitutionality, the same as the automatic death penalty statutes that the Supreme Court has struck down. See infra notes 11-14 and accompanying text. Nor am I making a claim of unconstitutionality by virtue of the word mandatory. Whether the Pennsylvania death penalty statute is unconstitutional depends on the limits it places on the sentencer's discretion, rather than a label appended to it. See The Supreme Court, 1975 Term, 90 HARV. L. REV. 56, 70 (1976) [hereinafter cited as 1975 Term]. One student note coined the term “quasi-mandatory” to define a statute that requires death “whenever an aggravating and no mitigating circumstance is proven and forbidding death in all other cases.” Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 HARV. L. REV. 1690, 1709 (1974) [hereinafter cited as New Statutes]. Justice Stewart, speaking for the controlling justices in the July 2nd cases, used the term mandatory in reference to automatic death penalty statutes. This article does not proceed with an argument based on the meaning of the word “mandatory”, but examines the actual workings of the Pennsylvania statute and evaluates constitutionality from that perspective.
\item It is not always clear from the face of a death penalty statute how much discretion the sentencer is given. Fourteen states have death penalty statutes with language that appears to order that death be returned under certain circumstances: Arizona, Arkansas, Colorado, Connecticut, Idaho, Illinois, New Jersey, Maryland, Montana, Ohio, Pennsylvania, Tennessee, Texas, and Washington. See supra note 1. However, such an enumeration may be highly misleading. Satisfaction of the conditions for imposing the death penalty may itself involve so much sentencing discretion as to be virtually unlimited. Cf. Adams v. Texas, 448 U.S. 38, 46 (1980) (Texas jurors “exercise a range of judgment and discretion” in answering three specific questions at sentencing hearing). In Arkansas, one of the require-
tencer is always permitted to return a sentence of life imprisonment. This article compares mandatory and permissive approaches and examines the constitutionality of one mandatory death penalty statute, that of Pennsylvania. For purposes of comparison, this article will also refer to the Georgia death penalty statute, the death penalty sentencing system most often considered by the United States Supreme Court.

Mandatory death penalty statutes are difficult to interpret because they both differ from and are similar to limits upon capital sentencing discretion already considered by the Supreme Court.

ments for returning a sentence of death is a unanimous finding by the jury that the "aggravating circumstances justify a sentence of death beyond a reasonable doubt." Ark. Stat. Ann. § 41-1302(c) (Supp. 1981-1982). Such a provision could be interpreted to include some evidence that this article argues the Pennsylvania statute excludes. See infra text accompanying notes 174-207. Furthermore, one can never be sure how a word like "shall" or "must" will be interpreted by the courts. See Beck v. State, 396 So. 2d 645, 660 (Ala. 1980); State v. Pinch, 306 N.C. 1, 24-25, 292 S.E.2d 203, 226-27 (1982) (language referring to a "duty to recommend a sentence of death" approved though no mandatory language in statute). This article will not discuss the degree to which language from that of the Pennsylvania statute might alter the analysis presented here.

7. The following state statutes contain language that appears always to permit at least one party, judge or jury, to return a life sentence: Alabama, California, Delaware, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Utah, Virginia, and Wyoming. See supra note 1. But see supra note 3.


9. See supra note 1. As will become apparent, my primary interest in the Georgia statute is the United States Supreme Court's interpretation of it in Gregg. This perspective does not do violence to present day realities since the statute has stood substantially the same since Gregg was decided in 1976. But see Ga. Cons. Ann. § 27-2538 (Supp. 1981) (1980 amendment concerning primarily appellate and post-trial procedures). Cf. Gregg, 428 U.S. at 162 n.3.


The fact that the Georgia system has been subjected to repeated appellate review does not, by itself, render the Georgia statute an appropriate subject for comparison. It does tend to suggest, however, that the Georgia statute is the product of a state actively involved with death penalty issues.
Mandatory death penalty statutes do not provide automatically for death upon conviction of a certain offense. Such statutes do not preclude consideration of all mitigating circumstances and are not, therefore, necessarily invalid under Woodson v. North Carolina,\textsuperscript{11} Roberts v. Louisiana,\textsuperscript{12} and H. Roberts v. Louisiana.\textsuperscript{13} Nevertheless, like such automatic death penalty statutes, mandatory statutes do require death under some conditions, and do not permit consideration of mitigating circumstances outside those that are enumerated.\textsuperscript{14}

This article will propose that mandatory death penalty statutes be understood as an attempt to reconcile two death penalty principles identified by the Supreme Court, non-arbitraryness and reliability.\textsuperscript{15} This attempt fails because mandatory statutes approach non-arbitraryness by the exclusion of irrelevant matters from evidence of mitigation. But the principle of reliability in death penalty sentencing precludes exclusion of any kind of mitigating evidence and requires that a sentencer be permitted to return a life sentence for any reason, or no reason. This recognition invalidates the Pennsylvania death penalty statute.

The first part of this article will introduce the Pennsylvania and Georgia statutes, and evaluate judicial interpretation of mandatory language in death penalty statutes generally. The second part will show the conflict between non-arbitraryness and reliability in Furman v. Georgia\textsuperscript{16} and Gregg, and suggest that Chief Justice Burger’s use of the concept of relevant mitigating evidence in Lockett v. Ohio\textsuperscript{17} attempted to reconcile these principles. The

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\item[13] 431 U.S. 633 (1977). The statutes at issue in Woodson, Roberts, and H. Roberts all prohibited consideration of any mitigating circumstances, which was the central issue discussed by Justice Stewart in the controlling opinions in Woodson, 428 U.S. at 304, and Roberts, 428 U.S. at 333-34, and in the per curiam opinion in H. Roberts, 431 U.S. at 636-37. It is, therefore, not difficult to distinguish the Pennsylvania statute from these automatic statutes. See infra text accompanying notes 23-24 and 29-31. The distinction does not, of course, suggest that the Pennsylvania statute is constitutional. See infra note 85.
\item[14] For the argument that valid mitigating considerations exist outside “the character and record of the individual offender or the circumstances of the particular offense,” see Woodson, 428 U.S. at 304. See also infra pt. III.
\item[15] For definition and discussion of the terms non-arbitraryness and reliability, see infra pt. II.
\end{footnotes}
third part will establish that this attempt could not succeed and that the Pennsylvania statute, which follows the Lockett formula, does not satisfy the minimum requirements of reliability because it does not permit the sentencer full freedom to consider all factors calling for a lesser penalty than death. Specifically, the Pennsylvania statute does not permit the sentencer to consider attacks upon the death penalty itself; it defines relevant mitigating evidence without regard for the community’s desire for retribution; and, it requires reasons for sentencing decisions.

I do not claim detachment or neutrality about capital punishment. I am involved actively in the defense of capital cases and in other activities against the death penalty. The reader will judge whether this commitment has clouded my judgment.

I. DISTINCTION WITHOUT A DIFFERENCE

A. The Pennsylvania and Georgia Statutes

Both the Pennsylvania and Georgia statutes create a bifurcated sentencing system in capital cases. Each statute provides first for a trial to determine whether the defendant is guilty of a capital crime. Once a guilty verdict is returned, both statutes provide for a sentencing hearing. At the sentencing hearing, the prosecution must prove beyond a reasonable doubt the existence of one or more of a specified series of “aggravating circumstances.”

18. For explanation of the Lockett formula for mitigation, see infra text accompanying notes 140-47.

19. For the general procedures utilized in each state, see the Pennsylvania and Georgia statutory provisions, supra note 1. See also the general description of the Georgia statute contained in Gregg v. Georgia, 428 U.S. 153, 162-68, 196-98 (1976).

20. In Pennsylvania, murder of the first degree is the only crime for which the death penalty is authorized. See 42 Pa. CONS. STAT. ANN. § 9711(a)(1) (Purdon Supp. 1982).

At the time Gregg was decided, Georgia retained the death penalty for six categories of crime: murder, kidnapping for ransom or where the victim is harmed, armed robbery, rape, treason, and aircraft hijacking. See Gregg, 428 U.S. at 162-63. The availability of the death penalty for crimes other than some type of murder seems to have been precluded by Coker v. Georgia, 433 U.S. 584 (1977). The death penalty also appears to be precluded for murder where the perpetrator does not cause, or attempt to cause, or intend the death of the victim. See Enmund v. Florida, 102 S. Ct. 3368 (1982).

both statutes, a death penalty is precluded unless the prosecution succeeds in establishing, beyond a reasonable doubt, the existence of one statutory aggravating circumstance. The sentencing systems differ, however, in their treatment of mitigating evidence. The defense has the opportunity in both Pennsylvania and Georgia to prove the existence of "mitigating circumstances." In the Pennsylvania statute, mitigating circumstances are specified, but broadly defined, so as to include "[a]ny . . . evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." Mitigating circumstances are not specified in the Georgia statute.

In Georgia, the sentencer is given unlimited discretion to return a life sentence. Although there are limits upon the kinds of mitigating evidence that are admissible at the sentencing hearing, the sentencer may return a life sentence without regard to aggravating or mitigating circumstances, or to their "weight" vis-a-vis each other. There is no requirement that the sentencer find the presence of a mitigating circumstance. The sentencer may return a life sentence for any reason, or for no reason.

In contrast to the Georgia capital punishment system, in Pennsylvania, the sentencer "must" return a sentence of death under two conditions. First, the sentence must be death if an aggravat-
ing circumstance is proved and no mitigating circumstance is proved. Second, the sentence must be death if the aggravating circumstances proved "outweigh" the mitigating circumstances proved. The verdict must be a life sentence "in all other cases." 29
The sentencer may consider, and act upon, only evidence that relates to specified aggravating and mitigating circumstances. 30 Thus, in Pennsylvania, sentencer discretion is circumscribed both in terms of the kind of evidence that may be heard and the manner in which it is to be evaluated.

one aggravating circumstance specified . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

It should be noted, that a unanimous jury is not required to return a verdict of life imprisonment. The required findings of mitigation by one juror ultimately forces the court to discharge the jury and impose a life sentence. Id. § 9711(c)(1)(v).

29. Id. § 9711(c)(1)(iv).
30. While this is the strong implication of the Pennsylvania statute's language, no one can be certain of the interpretation of the statute until the Pennsylvania Supreme Court has spoken. The scope of mitigating evidence may be construed as broader than it would appear and the mandatory thrust of the sentencing statute eliminated. See infra pt. I, sec. C. Furthermore, the Pennsylvania statute is not entirely free from ambiguity. The statute does not say that evidence shall "be limited to" specified mitigating circumstances, but rather that evidence "shall include" specified mitigating circumstances. See 42 PA. CONS. STAT. ANN. § 9711(a)(3), (d), (e) (Purdon Supp. 1982). It is possible that evidence could thus be permitted to go beyond the specified circumstances. In addition, the instruction concerning deciding upon the sentence, refers to "mitigating circumstance" in weighing, rather than to any mitigating circumstance specified. Id. § 9711(c)(1)(iv). While an unlimited interpretation of mitigation is possible, it is undermined first by the very breadth of mitigating circumstance number eight, which was clearly intended to mark an outer boundary of mitigating evidence to "[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." Id. § 9711(e)(8). Second, by the statutory instruction to the sentencing hearing judge to instruct the jury on "the mitigating evidence specified . . . as to which there is some evidence." Id. § 9711(c)(1)(ii). Accordingly, it appears that the defendant is limited by the statutory categories of mitigation.

It is important that the reader understand, at least as a preliminary matter, how the mandatory nature of the Pennsylvania statute operates to narrow jury discretion. Assume that a defendant wants to enter a circumstance into evidence that, although it might be persuasive to the jury, seems to the trial judge not to relate to the defendant's character or history of the circumstance of the offense. For example, how unhappy his parents will be if he is executed. See infra notes 214-20 and accompanying text. The trial judge would exclude this evidence and would forbid defense counsel to make any such appeal in his closing argument. A juror who, despite the court's rulings, can see plainly that the defendant's parents would be harmed by the defendant's execution and who would like to spare the defendant for this reason, may not vote for life under the statute unless some other mitigating circumstance outweighs existing aggravating circumstances.
B. Mandatory Statutes In State Court Decisions

Several state courts have considered, and upheld, the constitutionality of mandatory death penalty statutes. These statutes have been upheld on the ground that in fact they are not mandatory since they permit the defendant to introduce, and require the sentencer to consider, a wide range of mitigating circumstances.

The refusal of state courts even to discuss the mandatory nature of state death penalty statutes suggests that the difference between mandatory and permissive statutes is not seen as significant by these courts. There are two possible reasons why the difference


If the Texas statute approved in Jurek v. Texas, 428 U.S. 262 (1976) were taken literally, the constitutionality of mandatory statutes would be self-evident. Under the Texas sentencing system, death was mandatory, indeed automatic, if three narrow questions were answered in the affirmative. See id. at 269. Affirmative answers to these questions could be considered mandatory conditions for the imposition of death, in the same way that aggravation without mitigation, or aggravation that outweighs mitigation, are mandatory conditions for death in Pennsylvania. Jurek has been interpreted as permitting some type of legislative decision to require death. See 1975 Term, supra note 5, at 70: “But a statute that mandates the death penalty upon the satisfaction of certain specified conditions may not be unconstitutional if both mitigating and aggravating circumstances relating to the individual offender and his offense may be considered in the determination that those conditions are met.” Id.

However, Jurek has not been utilized to defend mandatory death penalty statutes. The reason for this may be doubt about its continuing validity after Lockett v. Ohio, 438 U.S. 586 (1978). See Hertz and Weissberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant’s Right to Consideration of Mitigating Circumstances, 69 Calif. L. Rev. 317, 332-41 (1981) [hereinafter cited as Hertz & Weissberg]; Gillers, supra note 3, at 37-38 n.166. Jurek was reinterpreted beyond recognition in Adams v. Texas, 448 U.S. 38, 46-47 (1980) (despite statutory questions, capital jurors in Texas exercise a range of judgment and discretion, so that a juror’s views about the death penalty validly influence the answers to these statutory questions).

32. See, e.g., Tichnell v. State, 287 Md. 695, 415 A.2d 830, 848 (1980): “We turn now to a consideration of the constitutionality of Maryland’s capital sentencing statute. That it is not a mandatory death penalty statute is clear. Because it allows for a broad consideration of mitigating circumstances, it plainly withstands scrutiny under Woodson v. North Carolina . . . and Roberts v. Louisiana . . . .” Id. (citations omitted). To the same effect is State v. Dicks, 615 S.W.2d 126, 130-31 (Tenn. 1921) (jury is not required to return a mandatory verdict of death, but must consider mitigating factors), and State v. McKenzie, 177 Mont. 280, 320, 631 P.2d 1205, 1228 (1978) (1981 Montana death penalty statute not a mandatory penalty because it allows for consideration of mitigating circumstances).
might not be considered a crucial, constitutional issue. First, it might be that both mandatory and permissive language permit equivalent discretion. Second, it might be that while mandatory and permissive statutes do create different sentencing systems, both approaches to capital sentencing are constitutional.33

State courts could interpret the language of mandatory statutes as permissive, thereby giving the sentencer discretion which is equivalent to that provided by permissive statutes. State courts might use either of two theories to interpret mandatory statutes as permissive. First, the language of mandatory statutes could be construed as permissive. Thus, for example, the word "must" in the Pennsylvania statute could be interpreted as "may," thereby creating a statute with sentencer discretion substantially similar to that of the Georgia statute.44 Such an approach would probably be considered if a state court doubted that the mandatory approach was constitutional.

An alternative, but more complex theory, would achieve the same permissive result through expansive interpretations of mitigating circumstances. A jury might be instructed, for example, that mitigating circumstance number eight of the Pennsylvania statute would be established and its weight conclusive if, for whatever reason, the jury hesitated to impose the death penalty in a particular case. Such an instruction would render irrelevant the mandatory language of the Pennsylvania statute.45 No doubt jury instructions could be written that would indicate clearly a jury's absolute discretion to return a life sentence. If such instructions were given, the constitutionality of a mandatory statute would be subsumed under the issue of the constitutionality of permissive death penalty statutes.46

33. I shall take up the latter idea in pt. II. For now, I will examine the constitutionality of mandatory statutes from the perspective that mandatory and permissive statutes are equivalent.
35. There is no way to be certain how the state courts that have affirmed mandatory statutes viewed the relationship between mandatory language and the scope of mitigating circumstances. Tennessee appears to define mitigating circumstances narrowly. See, e.g., Houston v. State, 593 S.W.2d 207, 275 (Tenn. 1980) (evidence of effect of execution on parents and society irrelevant). Idaho may be flirting with a broader view. See, e.g., State v. Osborn, 102 Idaho 405, 415 n.7, 631 P.2d 187, 197 n.7 (1981) (Lockett v. Ohio requires "unlimited mitigation") but neither state relates the scope of mitigation to the issue of the mandatory nature of the death penalty statute at issue.
36. For reasons I allude to briefly at the conclusion of this article, I do not consider
Devising clear jury instructions would not be an easy task however, if the apparently contradictory language of the death statute were read to the jury. The United States Supreme Court suggested in *Gardner v. Florida* that because "death is a different kind of punishment," the procedures by which a death sentence is imposed must be especially reliable. Thus, in *Gardner*, a defendant could not be sentenced to death based in part on information contained in a secret pre-sentence report, even though such a procedure might well be permissible in a non-capital case. There was too great a risk that on the basis of a secret report, "critical unverified information [might] be inaccurate and determinative . . . ." The same concern for reliable sentencing procedures led the Supreme Court to vacate death sentences in two cases in which it was not clear whether the sentencer was permitted to rely on the key mitigating factors that were admitted into evidence. The fact that the mitigating information was before the sentencer did not validate the proceedings. In another case, *Eddings v. Oklahoma*, the state death penalty statute did permit full consideration of the mitigating evidence at issue. The sentence was vacated nevertheless, because the sentencer apparently thought the statute precluded consideration of the evidence. The risk of mistaken interpretation by

the constitutionality of permissive statutes to be closed. Nevertheless, permissive statutes were approved on their face in *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Proffitt v. Florida*, 428 U.S. 242 (1976).

38. *Id.* at 357.
39. For further discussion, and definition of this concept of reliability, see infra notes 137-39 and accompanying text.
40. *430 U.S. at 359 n.10.*
43. *Id.* at 876 n.10.
44. Justice Powell noted that the trial judge concluded “as a matter of law” he could not consider evidence of violence in the defendant’s family history. *Id.* at 875 (emphasis in original). The sentencer is required “to listen” to any mitigating evidence presented by the defendant. *Id.* at 876 n.10. Cf. *Washington v. Watkins*, 655 F.2d 1346 (5th Cir. 1981) (sentencer must not be instructed to ignore admitted mitigating evidence); but see *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671 (1980) (evidence admitted, but unclear it was considered). The apparent refusal of state courts to consider evidence as mitigating unless it represents almost a legal excuse for murder is a widespread problem. See *State v. Britton*, 130
the sentencer of his responsibility was too great.\textsuperscript{\textdagger}

Interpreting a mandatory statute as permissive would create the
same risk of ambiguity concerning the sentencer’s understanding
of his role that was present in \textit{Eddings}. A state appellate court is
the final word on what a statute means,\textsuperscript{\textdaggerdbl} but cannot be the final
word on what a statute seems to mean to a jury.\textsuperscript{\dagger} Arguably, the
Pennsylvania statute appears to limit sentencing discretion. If the
statute were read to a jury, the jury might attempt to follow it
despite instructions to the contrary. If a death penalty requires an
absence of ambiguity to be valid,\textsuperscript{\textsection} curative instructions would not
necessarily satisfy the reliability requirement of \textit{Gardner}.\textsuperscript{\textsection} Thus
mandatory statutes interpreted as permissive might have serious
constitutional flaws.

\section*{II. THE ROLE OF MANDATORY LANGUAGE}

One may anticipate future attempts by courts to interpret
mandatory death penalty statutes, including that of Pennsylvania,
with due regard for their mandatory language. Notwithstanding
that mandatory statutes could be validly interpreted as permissive,
courts are likely to recognize, and give meaning to, the apparent
difference between mandatory and permissive statutes. Mandatory
language in death penalty statutes can be understood as an at-
ttempt to reconcile the concern for reliability in capital sentencing

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with the desire to reduce arbitrary sentencing results. The importance of sentencing discretion in Supreme Court death penalty decisions should convince state courts to interpret mandatory statutes in ways that recognize their potential contribution to death penalty theory.


Pennsylvania is no exception to the general trend that sought to comply with Furman through some type of mandatory death penalty statute. See 1975 Commonwealth of Pa. Legislative Journal-Senate 1152 (daily ed. Nov. 27, 1973) (remarks by Senator Gianfrani that automatic death penalty statute was sought originally as a way "to get around" Furman). The statute that emerged was similar in its mandatory approach to the Ohio statute struck down in Lockett. That is, death was required if an aggravating circumstance but no mitigating circumstance was established. See Act of Mar. 26, 1974, No. 46, § 3, 1974 Pa. Laws 214 (current version at 42 Pa. Cons. Stat. Ann. § 9711 (Purdon Supp. 1982)); Lockett, 438 U.S. at 611. The 1974 Pennsylvania death penalty statute was invalidated in 1977 in Commonwealth v. Moody, 476 Pa. 223, 382 A.2d 442 (1977), cert. denied, 438 U.S. 914 (1978), but because of limitations on mitigating circumstances. When the Pennsylvania death penalty was reenacted in 1978, the mandatory language was retained, although for reasons that are unclear, the "shall" used in 1974 was changed to "must" in 1978. Act of Sept. 13, 1978, No. 141, § 1, 1978 Pa. Laws 756 (current version at 42 Pa. Cons. Stat. Ann. § 9711 (Purdon Supp. 1982)). See also supra note 29. The present Pennsylvania statute was examined by the Pennsylvania Supreme Court in 1981, in Commonwealth v. Story, 497 Pa. 273, 440 A.2d 488 (1981), but neither the opinion by Justice Roberts, joined by Justices O'Brien and Wilkinson, nor the concurrence by Justice Nix mentioned the mandatory language of the statute. The death penalty was invalidated on the ground of retroactive application in violation of legislative intent. Justice Larsen in dissent, joined by Justices Flaherty and Kauffman, would have affirmed the defendant's death penalty, but also disavowed the issue of mandatory language. Certainly nothing in this history suggests that mandatory language in the death penalty statute is the result merely of the carelessness or poor drafting.

51. The obligation of state courts to give effect to the legislative decision about sentencing discretion goes beyond the general rule that courts are to interpret statutes by reference to the intent of the legislature. See, e.g., 1 Pa. Cons. Stat. Ann. § 1926 (Purdon Supp. 1982). As Justice Stewart emphasized in Gregg v. Georgia, 428 U.S. 153 (1976), the validity of the death penalty depends upon "contemporary standards," one important component of which is the judgment of a "democratically elected legislature." Id. at 175. Thus, there well may be an eighth amendment foundation for narrow construction of death penalty statutes. Cf. State v. Osborn, 102 Idaho 405, 414-15, 631 P.2d 187, 196 (1981) (statutory provision that court "shall" set forth mitigating factors considered, is to be interpreted strictly).
A. Furman v. Georgia: Arbitrariness

While Furman v. Georgia\(^{58}\) did not invalidate the death penalty per se, a five justice majority\(^{58}\) issued per curiam orders that invalidated existing death penalty statutes.\(^{59}\) Each of the five justices in the Furman majority wrote his own opinion.\(^{60}\) Thus, generalization is difficult. Nevertheless, it has been suggested by commentators\(^{61}\) and the various opinions indicate, that existing death penalty statutes were fatally afflicted by arbitrariness.\(^{62}\) Arbitrariness was a flaw not only in the general administration of the death penalty, but also in the decision of the senecner to impose death.

Of the five justices voting to overturn, only Brennan and Marshall would have found the death penalty per se cruel and unusual punishment.\(^{63}\) Justice Brennan identified several factors in an eighth amendment test, of which arbitrary infliction was one important consideration.\(^{64}\) By arbitrary, Justice Brennan appeared to

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52. 408 U.S. 238 (1972).
54. On the day Furman was decided, the Court vacated death sentences in twenty-six states. See Stewart v. Massachusetts, 408 U.S. 845 (1972); Order of June 29, 1972, 408 U.S. at 933-40 (1972) (death penalty judgments vacated on authority of Stewart). In all, the death penalty statutes of thirty-nine states and the District of Columbia were invalidated. See Furman, 408 U.S. at 411 (Blackmun, J., dissenting); id. at 417 (Powell, J., dissenting).
55. 408 U.S. at 240 (Douglas, J., concurring); id. at 257 (Brennan, J., concurring); id. at 306 (Stewart, J., concurring); id. at 310 (White, J., concurring); id. at 314 (Marshall, J., concurring). The dissenters also each wrote, although they joined each others opinion, with the exception of Justice Blackmun’s “personal . . . comments,” id. at 405 (Blackmun, J., dissenting); id. at 375 (Burger, J., dissenting); id. at 414 (Powell, J., dissenting); id. at 465 (Rehnquist, J., dissenting).
57. What follows is an analysis of what the Justices in the Furman majority appeared to mean by the concept of arbitrariness or its equivalent. I do not discuss the lack of strong empirical evidence for what appeared to be, at least in this regard, criticisms of the death penalty as applied. See New Statutes, supra note 5, at 1693-95. Either the Justices considered the facts of the matter clear beyond dispute, or the Justices were actually condemning a certain type of statute per se. See id. at 1695-97. Since no empirical evidence of non-arbitrary infliction of the death penalty was required to sustain death penalty statutes in Gregg, Proffitt, or Jurek, this latter explanation seems plausible. A facial challenge renders the discussion of forms of discretion, mandatory or permissive, that much more critical.
58. 408 U.S. at 375 (Burger, J., dissenting).
59. Id. at 282 (Brennan, J., concurring). But arbitrariness was not presented by Justice Brennan as the only, or even major reason for his vote in Furman:
mean the selection\textsuperscript{63} for death of only a very small number of those deserving to die, without any rational justification for differing treatment.\textsuperscript{64} Justice Marshall, in contrast, examined not arbitrariness but discrimination in the infliction of the death penalty.\textsuperscript{65} However, the two concepts are used in complementary fashion. In Marshall's view, from among the pool of "just-as-guilty person[s]," "the poor and the members of minority groups" are selected for death while the rich and well-connected are not.\textsuperscript{66} Justice Brennan would certainly have agreed that such a selection process did not represent a rational policy for differentiation. Both Justices Brennan and Marshall mentioned discretionary jury imposition of the death penalty as part of the selection process deemed arbitrary in the one opinion\textsuperscript{67} and discriminatory in the other.\textsuperscript{68}

The other three concurring Justices, Douglas, Stewart, and White, did not conclude that the death penalty was unconstitutional per se, but only that it was being applied in an unconstitu-

\textsuperscript{60} Id. at 295 (Brennan, J., concurring).

\textsuperscript{61} Id. at 276-77, 291 (Brennan, J., concurring).

\textsuperscript{62} As in the case of Justice Brennan, Justice Marshall relied upon the discriminatory imposition of capital punishment as only part of his reason for voting with the majority in Furman. Justice Marshall found that the death penalty was excessive, unnecessary, and abhorrent to currently existing moral values. \textit{Id.} at 358, 369 (Marshall, J., concurring). \textit{See also} \textit{id.} at 332-33 (Marshall, J., concurring) (Marshall's "test" of capital punishment's validity). Discrimination in the imposition of the death penalty was used by Justice Marshall to show that an informed citizenry would condemn capital punishment. \textit{Id.} at 363-64 (Marshall, J., concurring).

\textsuperscript{63} Id. at 366 (Marshall, J., concurring).

\textsuperscript{64} Id. at 295 (Brennan, J., concurring) ("[t]his Court has held that juries may, as they do, make the decision whether to impose a death sentence wholly unguided by standards governing that decision." (citations omitted)). Discretionary jury sentencing was only one part of the capital selection process Justice Brennan condemned. \textit{See id.} at 291-95 (Brennan, J., concurring).

\textsuperscript{65} Id. at 365 (Marshall, J., concurring) (absolute jury discretion to impose death penalty is "an open invitation" to discrimination). Justice Marshall condemned other aspects of the selection process for capital punishment as well. \textit{See id.} at 364-66 (Marshall, J., concurring).
tional manner. Of the three, Justice Douglas merged the objections of discrimination and arbitrariness in the selection for death. Justice Douglas argued that the eighth amendment requires that the death penalty “not [be] applied sparsely, selectively and spot-tily to unpopular groups.” The “seeds” of such discrimination and arbitrariness were sown in *McGautha v. California*, which approved unlimited jury discretion in the imposition of death sentences.

Given their roles in subsequent death penalty cases, Justices White and Stewart may be said to have had the determining word in *Furman*. Justice White did not use the word arbitrary, but found the systm of jury death penalty sentencing to be unconstitutional because “there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.” Such a system serves no coherent legislative policy. Justice Stewart suggested that those defendants who do receive the death penalty represent “a capriciously selected random handful” from among a much larger group of defendants, “many just as reprehensible,” who do not receive the death penalty. Both Justices White and Stewart described sentencing discretion as an impo-

66. Justice Douglas also argued that the infrequency of imposition of capital punishment represented a de facto rejection of the sanction by society. See id. at 245 (Douglas, J., concurring).
67. Id. at 256 (Douglas, J., concurring). By referring to the spotty imposition of the death penalty, Justice Douglas appears to mean that even racial and class bias do not account completely for the imposition of the death penalty upon some defendants, but not upon others. In some percentage of cases, even defendants who are poor or members of minority groups are spared, but for no reason that is apparent. See id. at 253 (Douglas, J., concurring) (“[p]eople live or die, dependent on the whim of one man or of 12”).
70. Justice White has authored influential opinions about limiting the application of the death penalty to cases in which death occurred, excluding cases in which the defendant did not cause death, attempt to cause death, or intend to cause death. See *Emmund v. Florida*, 102 S. Ct. 3368 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty for rape unconstitutional — plurality opinion); *Lockett v. Ohio*, 438 U.S. 586, 621-28 (1978) (White, J., concurring). Justice Stewart, of course, authored the opinions in the July 2nd cases that are considered authoritative. See *supra* note 2. Furthermore, in *Gregg v. Georgia*, 428 U.S. 153, 188 (1976), Justice Stewart cited to Justice White’s and to his own concurrence in *Furman*. *Gregg*, 428 U.S. at 188.
71. *Furman*, 408 U.S. at 313 (White, J., concurring).
72. Justice White’s primary objection to the death penalty was that the extreme infrequency of its imposition rendered improbable its value to any penological goal of the criminal justice system. Id. at 311-13 (White, J., concurring).
73. Id. at 309-10 (Stewart, J., concurring).
tant part of the arbitrariness of the system of capital punishment.74

The suggestion that a punishment is arbitrary, and hence unconstitutitional, unless there is a reason that juries impose it in some cases and not in others, is an unusual requirement. Generally in the legal system there is recognition that jury sentencing is a source of ad hoc judgment.75 The general acceptance of inconsistent or unprincipled verdicts76 is a recognition that juries sometimes temper "the harshness of the law and . . . bring community judgment to bear . . . ."77 Normally, the defendant who deserves punishment cannot complain because others, who also deserve punishment, do not receive the same treatment.78 A serious commitment to reasoned choice in capital cases thus might have undermined all death penalty sentencing. Notwithstanding their language in Furman, however, Justices Stewart and White did not insist on a meaningful basis for all death penalty decisions.

74. Justice White maintained that "the policy of vesting sentencing authority primarily in juries" achieved its aim of representing community values so well that capital punishment had "run its course." Id. at 313 (White, J., concurring). Justice Stewart referred repeatedly to the "imposition" of the death penalty, and concluded that the death penalty is "wantonly and freakishly imposed." Id. at 308-10 (Stewart, J., concurring).


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

78. This principle is illustrated by the majority rule that one defendant may not attack his conviction on the ground that an acquitted co-defendant logically should have been convicted as well. See, e.g., United States v. Odom, 377 F.2d 853, 858 (5th Cir. 1967) ("no vested right" in conviction of co-defendant); Quinn v. People, 96 Ill. App. 2d 382, 238 N.E.2d 619 (1968) (acquittal of other parties does not relieve defendant of his responsibility). See also Van Der Haag, Comment on Challenging Just Deserts: Punishing White-Collar Criminals, 75 J. CRIM. L. & CRIMINOLOGY 764, 767 (1982); Lempert, Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment, 79 Mich. L. REV. 1177, 1178-79 (1981) [hereinafter cited as Lempert].
B. Gregg v. Georgia: Reliability

Gregg v. Georgia, and four other cases decided the same day, rejected the notion that the death penalty was per se unconstitutional, except in the instance of an automatic death sentence upon conviction for certain crimes. A plurality composed of Justice Stewart, Powell, and Stevens announced opinions that have been interpreted as the authoritative view in these five cases.79 The plurality upheld the "guided discretion" statutes of Georgia, Texas, and Florida while overturning the automatic death penalty statutes of North Carolina and Louisiana.80

The Georgia, Texas, and Florida statutes were declared to have satisfied Furman's arbitrariness objection.81 In reviewing the Geor-

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79. See supra note 2.
80. Liebman and Shepard, Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder As A Mitigating Factor, 66 Geo. L.J. 757, 759-60 (1978) [hereinafter cited as Liebman and Shepard] (the July 2nd cases demonstrate that the death penalty is constitutional when sentence is provided "adequate individualized information and is guided by clear and objective standards" and sentence "is not imposed mandatorily"); Note, The Constitutionality of Mandatory Death Penalty For Life-Term Prisoners Who Murder, 55 N.Y.U. L. Rev. 636, 637 (1980) [hereinafter cited as Mandatory Death Penalty]; Hartz & Weisberg, supra note 31, at 320. See generally Note, Capital Punishment: A Review of Recent Supreme Court Decisions, 52 Notre Dame Law. 261 (1976) [hereinafter cited as Recent Supreme Court Decisions].
81. Deciding that these particular death penalty statutes satisfied the eighth amendment objections raised in Furman was only part of the decisions in Gregg, Proffitt v. Florida, 428 U.S. 242 (1976), and Jurek v. Texas, 428 U.S. 262 (1976). The Court, through the Stewart-Powell-Stevens plurality, also decided that the death penalty was not per se unconstitutional, thereby resolving the issue that had been left open in Furman, Gregg, 428 U.S. at 168-87. See supra notes 58-74 and accompanying text. Cf. infra note 98. This resolution was simply repeated in Proffitt, 428 U.S. at 247, and Jurek, 428 U.S. at 258.

In deciding the per se issue, Justice Stewart applied two tests that the eighth amendment apparently poses for a criminal sanction: whether the sanction meets society's "evolving standards of decency," Gregg, 428 U.S. at 173 (quoting the plurality opinion in Trop v. Dulles, 356 U.S. 96, 101 (1958)); and whether the sanction comports with the "dignity of man," Gregg, 428 U.S. at 173 (quoting Trop, 356 U.S. at 100). Capital punishment passed both tests. In terms of evolving standards, the death penalty's long history of acceptance, Gregg, 428 U.S. at 176-79, the post-Furman legislative landslide to re-enact the death penalty, id. at 179-80, one statewide referendum, id. at 181, and the continuing willingness of juries to impose the penalty at a substantial rate, id. at 181-82, demonstrated community support. The death penalty was viewed as not violative of the concept of human dignity because of the penalty's penological justifications: retribution and deterrence. Id. at 183. Justice Stewart turned then to the proportionality of capital punishment to murder and concluded that at least when a defendant takes life deliberately, the death penalty is not "invariably disproportionate to the crime." Id. at 187. Cf. Liebman and Shepard, supra note 80, at 772 (alternative analytical framework).

I will return to Justice Stewart's per se conclusions, particularly that concerning retri-
garia statute, Justice Stewart argued that it satisfied the need for "evenhanded justice" in part because the jury was to be "given guidance in its decisionmaking" through "clear and objective" aggravating circumstances to be weighed against mitigating circumstances, and in part because of appellate review of the proportion.
tionality of death sentences. Such procedures "reduce the likelihood that [a jury] will impose a sentence that fairly can be called capricious or arbitrary," and provide the "meaningful basis" for selection that was required by Furman.

As has been argued by others, the plurality's approach reduces the scope of arbitrary decision-making, but does not necessarily eliminate the flaw of comparable defendants receiving different penalties. Not only does essentially unlimited discretion in selection exist at the several executive stages, but, as alluded to ear-

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87. Gregg, 428 U.S. at 194-95. See, e.g., Gillers, supra note 3, at 26-29.

88. See e.g., Gillers, supra note 3, at 26-29.

89. Comparable defendants, in the sense of defendants of equal culpability receiving different sentences for murder, some the death penalty — most life imprisonment, seems to me to be what the Justices in the majority in Furman meant by the arbitrary application of the death penalty. See supra notes 57-78 and accompanying text. Cf. Bowers and Pierce, Arbitrariness and Discrimination Under Post-Furman Capital Statutes, 26 CRIME & DELINQ. 563, 572 (1980) [hereinafter cited as Bowers & Pierce]; Gillers, supra note 3, at 26-27.

90. It is not even clear that the scope of arbitrariness has been reduced. The requirement that an aggravating factor be proved before the imposition of the death penalty is permitted seems to reduce the number is the class of convicted murderers potentially subject to the death penalty. But, in fact, aggravating factors may be so "broadly defined" that it is an unusual murder case in which none are present. See Burden of Proof, supra note 3, at 316; Gillers, supra note 3, at 28. Cf. 42 Pa. Cons. Stat. Ann. § 9711(d)(6) (Purdon Supp. 1982) ("[t]he defendant committed a killing while in perpetration of a felony"). Such a broad definition may itself be unconstitutional. Godfrey v. Georgia, 446 U.S. 420 (1980) has been interpreted by one court to require that aggravating circumstances identify murders or murderers that stand "out above the norm." State v. Watson, 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981).

lier, the permissive sentencing language approved in Gregg permits the sentencer to refuse to impose the death penalty for any reason, or for no reason. Once aggravating circumstances are found, the sentencer is free, as before, to settle upon wealth, respectability, and race as reasons not to impose the death penalty. In Furman, the individual sentenced to death could claim that others, just as culpable, were not chosen for death. It was not disputed that the petitioner in Gregg could make the same claim. If the rich escape death, a person condemned may claim plausibly that he is condemned because he is not rich.

Justice Stewart responded in three ways to the argument that the Georgia system did not alter the conditions that had produced the arbitrary results condemned in Furman. As a general response to the problem of discretion, Justice Stewart rejected the idea that “Furman indirectly outlawed capital punishment by placing totally unrealistic conditions on its use.” Surprisingly, this argument appears to view Furman as a decision that justifies capital punishment. Whether any capital sentencing system could satisfy Furman's demand for non-arbitrariness was the issue that should

(Krivocha, C.J., dissenting in part). Abusive prosecutorial discretion can, of course, emerge as an issue in a particular prosecution, even if, generally, such discretion is permitted. See Messer v. State, 403 So. 2d 341 (Fla. 1981); Messer v. State, 330 So. 2d 137 (Fla. 1976).

92. See supra notes 25-28 and accompanying text.

93. While the jury in Proffitt v. Florida, 428 U.S. 242 (1976) could be said to be limited to consideration of mitigating circumstances proved to outweigh aggravating circumstances, the jury recommendation is only advisory. See id. at 248-49. The trial judge determines the actual sentence. It is not clear whether the judge is free to impose a life sentence for any reason or no reason. See id. at 250.

94. In fact, the petitioner in Gregg made a series of arguments that raised essentially this issue. See Gregg, 428 U.S. at 199-207. The factual predicate of inconsistency was not denied by Justice Stewart.

95. If aggravating circumstances are viewed as the reason that the death penalty is imposed, the Georgia sentencing system looks rational, especially since, as Justice Stewart said in Gregg, specified aggravating circumstances represent considerations deemed by society to be “particularly relevant.” Id. at 192. But the reason for the death penalty can just as easily be viewed as the absence of some mitigating circumstances that a jury deems important. (Since aggravating circumstances are so often present, viewing mitigating circumstances as the key to capital sentencing is a more sensible perspective. See supra note 90). Since a mitigating circumstance can be whatever strikes the jury's fancy, the absence of fame, wealth or respectability, or just a whim, can be the reason that death is imposed.

96. Gregg, 428 U.S. at 199 n.50. One cannot simply assume that because our system of criminal justice cannot redeem the Furman requirement of non-arbitraraness, the requirement itself is "unrealistic." It may be, instead, that the death penalty is incompatible with our frailties.
have been decided in *Gregg*. While *Furman* did not outlaw capital punishment, neither did it assure its continuation.

Justice Stewart also argued that the bifurcated system that was a part of the Georgia sentencing scheme would improve capital sentencing because the jury would receive information for the sentencing decision that would have been excluded under the usual one-trial sentencing systems in use at the time *Furman* had been decided. There is no doubt that bifurcated trials represent an improvement in capital sentencing; however, since information concerning aggravating circumstances usually is admissible at the guilt phase of the trial, the additional information will normally concern mitigating factors. Increases in mitigating information do not lessen arbitrariness. In fact, bifurcated procedures giving a sentence more reasons to spare people, undermine the coherence of the concept of arbitrariness as understood in *Furman*.

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98. There seemed to be a majority in *Furman* for the proposition that the death penalty is not per se unconstitutional. See *New Statutes*, supra note 5, at 1691 n.5. While Justices Stewart and White stated that the issue need not be reached, they did appear to reach it after all. *Furman*, 408 U.S. at 306, 308 (Stewart, J., concurring); id. at 310-12 (White, J., concurring). Nevertheless, neither Justice was obligated to find in future cases that new death penalty statutes resolved the criticisms made in *Furman*. Cf. supra notes 70-74 and accompanying text. Justice White, for one, suggested capital punishment had “run its course.” *Furman*, 408 U.S. at 313. *Furman*’s criticisms of the application of the death penalty certainly could have turned out to be both valid and unavoidable.


100. Of the 10 aggravating circumstances in the Pennsylvania statute, for example, eight involve aspects of the crime that would almost always be admissible to prove guilt. 42 Pa. Cons. Stat. Ann. § 9711(d)(1)-(8) (Purdon Supp. 1982). The remaining two aggravating circumstances concern the criminal record of the defendant. Id. § 9711(d)(9), (10). Whether the defendant’s criminal record would be admissible in the guilt phase of a murder case depends on a particular state’s rule of allowable impeachment and whether the defendant testifies at the guilt phase.

101. The idea of arbitrariness in *Furman* assumed that defendants in different cases could be considered in some sense comparable. See supra note 90 and accompanying text. Such a concept seems attractive from the point of view of aggravating circumstances, which are often objective in nature. See *Gregg*, 428 U.S. at 158. Cf. 42 Pa. Cons. Stat. Ann. § 9711(d)(1) (Purdon Supp. 1982) (victim a fireman or certain types of other government official); id. § 9711(d)(2) (contract killing); id. § 9711(d)(3) (victim held hostage); id. § 9711(d)(4) (murder during hijacking); id. § 9711(d)(5) (victim a prosecution witness); id. § 9711(d)(6) (murder during a felony); id. § 9711(d)(7) (gave risk of death to another); id. § 9711(d)(8) (murder by torture); id. § 9711(d)(10) (murder by one previously convicted of capital offense); but see id. § 9711(d)(9) (“significant history” of violent felony convictions); Godfrey v. Georgia, 446 U.S. 420, 422 (1980) (aggravating circumstance that the murder
more mitigating information is presented, it becomes more difficult to identify similar cases for similar treatment.102

Justice Stewart's specific response to the problem of absolute sentencer discretion in Gregg was to emphasize appellate review of sentences and the nature of mercy. Justice Stewart did not dispute that juries could return a life sentence for any reason, or no reason, but referred to such an event as an "isolated decision,"103 which was subject to the Georgia Supreme Court's proportionality review104 and which did not invalidate the sentencing system.105

Justice Stewart's view seems to have been that if juries generally reject death in a certain class of cases, the Georgia Supreme Court will see that death is never imposed in cases of that class.106 Thus, death will not be imposed arbitrarily. On the other hand, if a jury spares someone merely on a whim, an occasional act of grace does not undermine the sentencing system as a whole. Such a decision represents a benefit to the individual defendant, but is not a burden on other defendants. As one article has described this approach, there must be a reason for imposing the death penalty, but there need not be one for not imposing it upon someone who deserves it.107

"was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"). Once the focus shifts from aggravating circumstances to mitigating circumstances, the differences among defendants undermines the easy assurance of the Furman opinions that certain capital cases are alike. Cf. Gillel, supra note 3, at 29-30.

102. The presentation of detailed, individualized mitigating evidence not only renders problematic the concept of non-arbitrary jury sentencing over time, as a practical matter it undermines the appellate role of ensuring the sentencing consistency that the Gregg plurality considered vital. See supra note 56. See infra notes 104-08 and accompanying text. Cf. Combs, The Supreme Court and Capital Punishment: Uncertainty, Ambiguity, and Judicial Control, 7 S. Univ. L. Rev. 1, 34 (1980); 1977 Term, supra note 56; New Statutes, supra note 5, at 1703-04. New methods of review may be necessary to overcome this problem assuming that it can be overcome. See Excessive Sentencing, supra note 91.

103. Gregg, 428 U.S. at 203.

104. The Georgia Supreme Court was to review every death sentence to determine, inter alia, "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Id. at 204 (citation omitted).

105. Id. at 203-06. Justice Stewart is not entirely clear on the relationship among sentencing elements. He appears to assume that generally the aggravating circumstance approach, which guides jury discretion, will ensure non-arbitrariness. Id. at 197. Appellate proportionality review represents an "additional safeguard," id., at 198, against an "aberrant jury." Id. at 206.

106. Id. at 206.

107. See Hertz & Weisberg, supra note 31, at 376: "[T]he eighth amendment requires
Aside from its ungrounded faith in appellate review, one of Justice Stewart’s arguments represents a very narrow interpretation of Furman. In Gregg it appears that the arbitrariness problem in Furman had not been that some who deserved death received death while others who also deserved death did not. Gregg suggests that the only problem with the death penalty had been that almost everyone who deserved death did not receive it, except for a handful selected at random. Thus, the fact that after Gregg, Georgia juries will return life sentences for some persons who deserve to die does not invalidate the statute, because such acts will not occur most of the time.

reliability and guided discretion in the decision to impose death, but not in the decision to afford mercy by imposing a non-capital sentence.” Id.

108. There are three senses in which the plurality’s reliance upon appellate proportionality review is misguided. In the first place, the task itself, ensuring that like defendants are treated alike, may be an incoherent task. See supra note 102. Second, the plurality failed to clarify the relationship of jury grace to arbitrariness. If occasionally juries spare a certain kind of defendant, those decisions represent isolated decisions to grant mercy and the state supreme court is not expected to intervene on behalf of defendants not spared. On the other hand, if certain types of defendants are “generally” spared, the state supreme court is obligated to reverse death sentences for those not spared. Gregg, 428 U.S. at 206. At what point the ratio of life sentences to death sentences tips, is unclear. See Excessive Sentencing, supra note 91, at 16 n.52.

But by far the most serious criticism of the plurality’s reliance upon state appellate courts to protect defendants from arbitrary sentencing is that the state courts had to understand an appellate role that went beyond ensuring that substantial evidence justified the death penalty in a given case. There is reason to believe that not all state courts have understood their apparently constitutionally critical role. See Hargrave v. State, 366 So. 2d 1, 5 (Fla. 1978), cert. denied, 444 U.S. 985 (1979) (to be overturned, a death penalty must represent a departure, or the defendant must not deserve death); Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982) (en banc) (reviewing court held that it would not pass on the adequacy of all aggravating circumstances found, but only one). Cf. Quince v. State, 51 U.S.L.W. 3251 (Oct. 4, 1982) (No. 81-5096) (Brennan, J., dissenting from denial of certiorari is Quince v. State, 414 So. 2d 185 (Fla. 1982)); Confrey v. Georgia, 446 U.S. 420, 429-33 (1980). See generally, Dix, Appellate Review of the Decision to Impose Death, 68 Geo. L.J. 97 (1979).

109. In the language of Justice Stewart’s image in Furman, the problem with being struck by lightning is not that the person struck does not deserve it anymore than the persons not struck. Furman, 408 U.S. at 309. Rather, the complaint is that, of the group who deserve it, almost no one is struck by lightning. The answer to this criticism simply is to increase the number struck by lightning, which is what Justice Stewart apparently sought to do in Gregg.

110. This re-interpretation of Furman would not be acceptable even if it turned out to be true that most people who deserve to die receive the death penalty. Justice Stewart’s approach simply ignores the question put by the one condemned, “why am I condemned when he is not?” No matter how few are spared, this question represents a serious moral issue. See Super Due Process, supra note 96, at 1150. In any event, the facts appear to show
Justice Stewart’s approach to jury grace rests upon curious empirical assumptions. Because of the requirement of at least one aggravating circumstance, the pool of those eligible for death may be smaller than previously.\(^{111}\) Justice Stewart apparently assumed in *Gregg* that under the new Georgia sentencing system sentencers would hand out a much higher proportion of death penalties to members of this smaller pool, than under the *pre-Furman* system.\(^{112}\) Whether this has turned out to be the case is not yet known,\(^{113}\) but looking at the sentencing system as a whole, it surely remained true after *Gregg* that most murderers who qualify for death because at least one aggravating circumstance is present,\(^{114}\) will not receive a death sentence.\(^{115}\)

From the perspective of the sentencing decision itself, the essentially unlimited discretion given to Georgia sentencers not to impose death did invite, if it did not assure, the same random pattern of like cases treated differently that was condemned in *Furman*. Indeed, the underlying inconsistency between *Gregg* and *Furman* has now become clearer as state court opinions have criticized unguided mitigating discretion as inconsistent with attempts to limit that many are spared, just as before. *See infra* notes 111-15 and accompanying text.


\(^{112}\) There is very little empirical evidence concerning the arbitrariness of the imposition of the death penalty prior to *Furman*. See Note, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-Furman Cases in Dade County Florida, 1973-1976*, 133 Stan. L. Rev. 75, 84-85 (1980) [hereinafter cited as Dade County]. The majority assumed arbitrariness from the extreme infrequency of imposition. *See*, e.g., Furman, 408 U.S. at 293 (Brennan, J., concurring); *id*. at 309-10 (Stewart, J., concurring); *id*. at 313 (White, J., concurring). Infrequency was certainly demonstrable. *Dade County*, supra.


\(^{114}\) That is a substantial proportion of those who murder. *See supra* note 50.

\(^{115}\) *See Dade County*, supra note 112 (of 54 first degree murder convictions involving death during the commission of a felony, where the death penalty was an available option, ten death penalties were imposed and sustained; the author considers 24 of the life sentence cases to be clearly distinguishable, 14 to be debatably distinguishable, and 6 to be indistinguishable).
arbitrariness in capital sentencing.\textsuperscript{116}

Despite the inconsistency in approach between \textit{Furman}’s emphasis on the elimination of arbitrariness and \textit{Gregg}’s allowance of unlimited discretion to refuse to return the death penalty, one could not say that \textit{Furman} was repudiated in \textit{Gregg}. Justice Stewart’s opinion downplayed arbitrariness because it emphasized another value, reliability in capital sentencing, that had not been at issue in \textit{Furman}.\textsuperscript{117} In rejecting an automatic death penalty in \textit{Woodson v. North Carolina}, Justice Stewart stated that full consideration of mitigating circumstances is necessary to achieve a “just and appropriate sentence.”\textsuperscript{118} In \textit{Gregg}, Justice Stewart referred to \textit{Woodson} in rejecting the argument that too much discretion remained in the Georgia sentencing system.\textsuperscript{119} No matter what a defendant has done, a death sentence might be unjust in light of the defendant’s personal qualities. Permissive sentencing is a way to ensure reliability—to ensure that persons who do not deserve the death penalty, do not receive it.\textsuperscript{120} The difficulty is that the discretion that is seen as necessary to promote reliability, may increase arbitrariness.\textsuperscript{121} While \textit{Lockett v. Ohio}\textsuperscript{122} is generally viewed as exacerbating this problem,\textsuperscript{123} in fact, \textit{Lockett} and mandatory

\begin{enumerate}

\item By reliability, I mean an assurance that the defendant who receives the death penalty in fact deserves to die. By putting the matter this starkly, I do not mean to imply that arbitrariness and reliability are unrelated. In deciding whether someone “deserves” the death penalty, the fact that others just like him do not receive the death penalty is obviously significant. See \textit{Supra Due Process}, supra note 56, at 1150-51.

\item 428 U.S. at 304.

\item \textit{Gregg}, 428 U.S. at 199-200 n.50.

\item See \textit{Hertz and Weisberg}, supra note 31, at 322; \textit{Mandatory Death Penalty}, supra note 82, at 651-52.

\item \textit{See Kanter, supra note 111, at 637-38.


\item Lockett’s requirement of the admission of broad categories of mitigating evidence in the sentencing hearing brought forth a multitude of observations that the Court was undermining the \textit{Furman} requirement of non-arbitrariness. See \textit{infra notes 135-39 and accompanying text. See, e.g., 44 Mo. L. Rev. 359 (1979) (Lockett is “[a]nother retreat from \textit{Furman} v. Georgia”); 16 Am. Crim. L. Rev. 317 (1979) (Lockett is an “[a]bout face”); \textit{Burden of Proof, supra note 3, at 351-52 (Supreme Court “shifted gears” in \textit{Lockett}). See also \textit{State v. Dicks}, 615 S.W.2d 129, 133 (Tenn. 1981) (Block, J., dissenting) (tension between \textit{Furman} and \textit{Lockett}). The dissenters in \textit{Lockett} were particularly critical on this point. See

sentencing statutes may be interpreted as an attempt to resolve the conflict between eliminating arbitrariness and ensuring reliability.

C. Lockett v. Ohio and Mandatory Sentencing Statutes: Eliminating the Irrelevant

I. Reliability

Lockett v. Ohio and its companion case, Bell v. Ohio\(^{124}\) overturned the Ohio death penalty statute which permitted the introduction of broad categories of defense evidence at the sentencing hearing,\(^{128}\) but limited the sentencer's\(^{126}\) authority to evaluate it. This evidence could only be relied upon in establishing three mitigating circumstances: "(1) The victim of the offense induced or facilitated it; (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation; (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."\(^{127}\) The fact that Sandra Lockett did not intend the death of the victim and her relatively minor role in the killing\(^{128}\) could

\(^{124}\) Lockett, 438 U.S. at 622 (White, J., concurring in part, dissenting in part) ("The Court has now completed its about face since Furman v. Georgia . . ."); id. at 629 (Rehnquist, J., concurring in part, dissenting in part) ("[T]he Court has gone from pillar to post . . .").

\(^{125}\) The defendant was permitted to introduce evidence concerning "the nature and circumstances of the offense" and the "history, character and condition" of the defendant. Lockett, 438 U.S. at 593. Ohio Rev. Code Ann. § 2929.04(B) (1975).

\(^{126}\) The Ohio statute provided for capital sentencing by the trial judge if the defendant had been tried by a jury. Lockett, 438 U.S. at 593; Ohio Rev. Code Ann. § 2929.03(C)(2) (1975). Sandra Lockett's sentencing hearing was conducted by the trial judge. See Lockett, 438 U.S. at 593.


\(^{128}\) Sandra Lockett was charged with aggravated murder, with two aggravating specifications: "(1) that the murder was committed for the purpose of escaping detention, apprehension, trial or punishment for aggravated robbery, and (2) that the murder was committed while . . . committing, attempting to commit, or fleeing immediately after committing or attempting to commit . . . aggravated robbery." Lockett, 438 U.S. at 589.

Testimony at the trial established that Lockett agreed with two others to commit an armed robbery at a pawn shop. The defendant's role was to keep watch outside the shop and drive the getaway car. The conspirators had not planned to kill anyone. The shop owner was killed during the holdup when he grabbed for a gun used by one of the conspirators. Lockett's attorney maintained at trial that the defendant did not know of the robbery plan. Id. at 589-93.
not be considered as mitigation, except to the extent that this information tended to establish one of the three statutory mitigating circumstances.\textsuperscript{129} This limitation upon the consideration of defense evidence was enforced by the mandatory nature of the Ohio statute.\textsuperscript{130} Once one aggravating circumstance was proved, death was required unless one of the three mitigating circumstances was established.

Chief Justice Burger wrote the lead opinion on behalf of himself and the \textit{Gregg} plurality.\textsuperscript{131} Chief Justice Burger followed the analysis of \textit{Woodson v. North Carolina},\textsuperscript{132} \textit{Roberts v. Louisiana},\textsuperscript{133} and \textit{H. Roberts v. Louisiana},\textsuperscript{134} on the theory that though the Ohio statute permitted some consideration of mitigation, the narrow categories of mitigation the statute recognized created "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty"\textsuperscript{135} just as did automatic death penalty statutes.\textsuperscript{136} The dominant consideration for Chief Justice

\textsuperscript{129} There were other possible mitigating circumstances upon which the statute did not permit the trial judge to base a sentence of life imprisonment. Lockett was 21 years old, of average or below average intelligence, indicated a favorable prognosis for rehabilitation, and had no record of major offenses although she had been convicted of several minor ones. \textit{Id.} at 594. The trial judge stated that he had "no alternative" but to impose the death penalty. \textit{Id.}

\textsuperscript{130} If the Ohio statute had been a permissive statute, that is if the sentencer had been instructed that if none of the three mitigating circumstances were established, the death penalty could be imposed, the sentencer would have been free to impose a life sentence on the basis of non-specified mitigating circumstances. The problem identified by Chief Justice Burger arose precisely because the Ohio statute was a mandatory statute that required death unless one of the three mitigating circumstances was proved.

\textsuperscript{131} Although Chief Justice Burger's views concerning the constitutional requirements for mitigating evidence in death penalty sentencing hearings literally reflected only four votes, Justice Marshall's concurrence seemed to agree with the plurality's analysis. \textit{See Lockett}, 438 U.S. at 620-21 (Marshall, J., concurring). Thus, one may regard the Chief Justice's opinion in \textit{Lockett} as a majority position. Justice Brennan, who did not participate in the case, might have agreed as well. There is no certainty about Justice Blackmun's views. \textit{See Hertz and Weisberg, supra note 31, at 325 n.43.}

\textsuperscript{132} 428 U.S. 280 (1976).

\textsuperscript{133} 428 U.S. 325 (1976).

\textsuperscript{134} 431 U.S. 633 (1977). In \textit{H. Roberts}, the Supreme Court, in a per curiam opinion joined by Brennan, Stewart, Marshall, Powell, and Stevens held that an automatic death penalty for killing a police officer violates the eighth amendment. The per curiam opinion relied heavily on \textit{Woodson} and \textit{Roberts}. \textit{Id.} at 635-38.

\textsuperscript{135} \textit{Lockett}, 438 U.S. at 605.

\textsuperscript{136} In \textit{Lockett}, Chief Justice Burger did leave open the possibility that a statute that mandates death for a very narrow class of crimes, such as murder by a life-term prisoner, might be constitutional. \textit{Id.} at 604 n.11. \textit{See Mandatory Death Penalty, supra note 82.}
Burger in \textit{Lockett} was reliability.\footnote{137} This concept, which Chief Justice Burger traced to \textit{Woodson},\footnote{138} required procedures that attempt to ensure that “death is the appropriate punishment in a specific case,”\footnote{139} Ohio had run the risk of the “wrong” decision not by keeping out evidence, but by instructing the sentencer not to give the mitigating evidence full consideration.

2. \textit{Relevance}

The concept of relevance is another aspect of \textit{Lockett} which has received much attention from state courts considering the admissibility of proffered mitigating evidence.\footnote{140} In \textit{Woodson}, Justice Stewart held that the eighth amendment “required consideration of the character and record of the individual offender and the circumstances of the particular offense.”\footnote{141} In \textit{Lockett}, Chief Justice Burger reiterated this formulation, and added that this eighth amendment requirement included “any aspect” of character, record, or offense.\footnote{142} The sentencer must also be permitted to give

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\textsuperscript{137} The relationship between reliability and individualization in sentencing is clear in \textit{Lockett}: individualized sentencing, that is sentencing procedures that allow very broad mitigating evidence in order to concentrate attention on this defendant and this offense, helps to ensure reliability in sentencing. \textit{See Lockett}, 438 U.S. at 602 (“the definition of crimes generally has not been thought automatically to dictate what should be the proper penalty”).

The relationship between reliability and the value of “respect for the uniqueness of the individual” is not so clear. Certainly Chief Justice Burger expressed the idea that because death is different from any other sentence, “respect for humanity” requires a greater degree of reliability in death penalty sentencing than in other kinds of sentencing. \textit{Id.} at 604 (quoting \textit{Woodson}, 428 U.S. at 304). Thus, respect for persons requires reliability which in turn requires individualization (i.e., broad mitigation) in death penalty sentencing hearings.

But a quite different approach would require individualization in sentencing without reference to reliability. Justice Brennan’s concurrence in \textit{Furman} suggested that the eighth amendment prevents punishments that treat people “as objects.” \textit{Furman}, 468 U.S. at 273. It might well be argued that respect for persons requires consideration of each person’s uniqueness regardless of the consequences of such a procedure for sentencing outcomes. It seems clear that Chief Justice Burger did not base his conclusion that broad mitigation must be admitted into evidence on this ground, but rather because of the predicted consequence of such a requirement: more reliable capital sentencing.

\textsuperscript{138} 438 U.S. at 601 (\textit{Woodson} required consideration of the character and record of the individual offender and the circumstances of the particular offense “in order to ensure . . . reliability”).

\textsuperscript{139} 438 U.S. at 601 (quoting \textit{Woodson}, 428 U.S. at 305).

\textsuperscript{140} \textit{See infra} note 147.

\textsuperscript{141} \textit{Woodson}, 428 U.S. at 304.

\textsuperscript{142} 438 U.S. at 604. “[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from
such mitigating evidence full consideration.\textsuperscript{143} Such evidence he defined as “relevant.”\textsuperscript{144} But in a footnote, Chief Justice Burger stated that information relating to character, record, and offense was the only type of mitigating evidence accorded constitutional protection. “Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant’s character, prior record, or the circumstances of his offense.”\textsuperscript{145} Other evidence could be excluded and, presumably if somehow admitted, could be precluded from consideration.\textsuperscript{146} Thus, according to the \textit{Lockett} opinion, there are two kinds of mitigating evidence. Reasons relating to character, record, and offense are relevant. Reasons that do not refer to character, record, and offense are irrelevant. Irrelevant evidence is excludable. In \textit{Lockett}, Chief Justice Burger created an admissibility formula.\textsuperscript{147}

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\textit{considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense . . . .} “Id. (footnotes omitted; emphasis in original).

\textsuperscript{143} Id. at 605. “[A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant’s character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty” and is thus unconstitutional. Id.

\textsuperscript{144} Id. at 604.

\textsuperscript{145} Id. at 604 n.12.

\textsuperscript{146} Of course this recognition does not mean that states are obligated to exclude such irrelevant evidence—that is, evidence relating to factors other than character, record and offense. See, e.g., Cofield v. State, 247 Ga. 98, 274 S.E.2d 530 (1981) (evidence of effect of defendant’s execution on family and society admissible whether within \textit{Lockett} definition of relevant evidence, or not). \textit{But see} People v. Ramos, 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (1982), cert. granted, 51 U.S.L.W. 3217 (U.S. Oct. 4, 1982) (No. 1893) (instruction that governor may commute sentence of life imprisonment without parole violates due process by introduction of matters deemed irrelevant in \textit{Lockett}). \textit{Ramos} probably does not stand for the proposition that mitigating evidence proffered by a defendant that is outside the character-record-offense formulation must be excluded. The California Supreme Court was obviously greatly influenced by its alternative holding that the instruction was incomplete and misleading and thus unconstitutional. \textit{Id.} at 578-81, 639 P.2d at 933-36, 180 Cal. Rptr. at 291-94. In terms of death penalty precedent, the evil in the instruction is not that it introduces factors irrelevant under \textit{Lockett}, but that it suggests a reason for death, incapacitation, that the United States Supreme Court has never accepted as a legitimate ground for the death penalty. \textit{See} Gregg v. Georgia, 428 U.S. 152, 183-87 (1976) (although mentioning incapacitation as a proffered justification for the death penalty, only general deterrence and retribution were relied upon). Specific deterrence thus becomes a kind of non-statutory, unclearly-labelled aggravating circumstance, in violation of \textit{Furman’s} non-arbitrariness principle. \textit{See} Henry v. Wainwright, 661 F.2d 56, 58 (5th Cir. 1981); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). \textit{See also supra} note 22.

\textsuperscript{147} \textit{See}, e.g., Burrows v. State, 640 P.2d 533 (Okla. 1982) (mitigating evidence is admissible to the extent it bears on the defendant’s character, record or the circumstances of
What does “relevant” mean in this context? Generally speaking, evidence is deemed relevant when it has probative value, that is, it tends to prove a proposition in dispute.¹⁴⁸ The issue in dispute in a death penalty hearing, in Chief Justice Burger’s view, is whether “death is the appropriate punishment,” or, to put the matter in its most dramatic form, whether the defendant deserves to die.¹⁴⁸ Mitigating evidence outside the formula is irrelevant because it does not tend to prove that the defendant does not deserve to die.

The idea that some reasons upon which a jury might decide to spare a defendant are not relevant to whether the defendant deserves to die, establishes a link between Lockett and the non-arbitraryness principle of Furman. In deciding upon a life sentence a jury might conduct a lottery, or act on whim, or consider the wealth and power of a defendant’s family. All of these considerations could be “reasons” for returning a life sentence, but I have no doubt Chief Justice Burger would consider them to be “irrelevant” considerations—that is, they do not bear on the issue of what punishment the defendant deserves. This of course assumes a theory that accounts for what should be considered and what should not be considered in the decision to impose capital punishment—an issue which is addressed below.¹⁵⁰ It also assumes that the Lockett formula encompasses the proper considerations—a matter subject to question.¹⁵¹ Nevertheless, by use of the concept of relevance,

¹⁴⁸ See McCormick’s Handbook of the Law of Evidence, §§ 184-85 (E. Cleary 2d ed. 1972). To be precise evidence is relevant when it has probative value and is material when the matter the evidence tends to prove is in dispute. I have collapsed the evidentiary terminology, but, I think, without harm to the basic distinctions. See also J. Wigmore, A Treatise of the Anglo-American System of Evidence in Trials at Common Law § 12 (1940).

¹⁴⁹ The use of the term “deserves” to die is not meant to suggest that some theory of retribution is the only ground upon which a decision for life or death could be justified. Other values, specifically general deterrence and incapacitation, have been mentioned as grounds for imposition of the death penalty, and I do not mean to exclude them as relevant to aggravating circumstances, nor their absence as a relevant mitigating circumstance. See supra note 146.

¹⁵⁰ See infra pt. III, sec. B.

¹⁵¹ See infra pt. III, sec. A.
Chief Justice Burger is echoing Justice White's requirement of a "meaningful basis" for the decision. The decision to impose death, or its reverse, to grant life, will not be arbitrary if it is based on considerations deemed relevant.

3. Relevance and Reliability In Permissive and Mandatory Statutes

From the perspective of deciding on a capital sentence by reference only to relevant evidence, the statutory sentencing system approved in Gregg appears to be seriously flawed and the Pennsylvania mandatory system a significant improvement. In Gregg, the jury is instructed to consider all mitigating circumstances and decide upon the sentence. Justice Stewart in Gregg referred to this permissive sentencing aspect of the statute as "the decision of a jury to afford mercy." But from the relevance perspective, mercy could be based upon irrelevant considerations as well as relevant ones. Gregg permits the sentencer to give a life sentence even if relevant considerations are not persuasive. The sentencer is free to consider irrelevant matters such as class, race, respectability, the roll of the dice, or anything else. The Georgia courts might deny that the sentencer is free to consider such matters. The courts might exclude such evidence, and not permit argument based on such factors. Nevertheless, the sentencer is never told

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152. Furman, 408 U.S. at 313 (White, J., concurring).
154. A relevant mitigating factor ... enables a sentencer to decide against the death penalty for one of two defendants, possibly even if it is only difference between them. A factor is relevant if it represents a rational consideration in choices of penalty. Consequently, a decision based, in whole or in part, on a relevant factor is by definition not arbitrary.
155. Id.
156. 428 U.S. at 164. The jury is told to consider aggravating circumstances as well. Id.
157. See supra notes 25-28 and accompanying text.
159. Cf. State v. Collier, 244 Ga. 553, 568, 261 S.E.2d 364, 376 (1979) (no error to exclude some types of character evidence because of "danger of . . . irrelevant testimony inherent in character evidence . . . ."); State v. Franklin, 245 Ga. 141, 148, 263 S.E.2d 666, 673 (1980) (testimony at sentencing hearing concerning conditions on death row and religious and philosophical positions on the death penalty, should be addressed to legislature; such evidence may be excluded from sentencing hearing).
to restrict consideration to relevant matters.\textsuperscript{159} Lockett suggests, though it does not require,\textsuperscript{160} a very different approach to sentencing. Because of concern for reliability, the sentencer must be given full discretion to return a life sentence. But in order to limit arbitrary results, the sentencer may be ordered to consider only evidence that is relevant. Chief Justice Burger did not believe he was sacrificing reliability by limiting consideration to relevant matters.\textsuperscript{161} He assumed that he could identify the factors that ought to be considered in capital sentencing.\textsuperscript{162} If relevant factors were considered, the resulting sentence would be reliable.\textsuperscript{163}

The Pennsylvania death penalty statute creates just such a sentencing system through its mandatory language. The statute seeks to ensure reliability by requiring the fullest possible consideration of relevant mitigating evidence. The statute reduces the likelihood of consideration of irrelevant factors by instructing the sentencer to consider relevant mitigating evidence only, that is, any evidence “concerning the character and record of the defendant and the circumstances of his offense.”\textsuperscript{164} If no relevant mitigating evidence is present, or if such evidence is outweighed by evidence of aggravating circumstances, the death penalty must be imposed.\textsuperscript{165} Consid-

\textsuperscript{159} The sentencer may give life for any, or no reason. See supra notes 25-28 and accompanying text.
\textsuperscript{160} That is, irrelevant evidence may still be heard. See supra note 146.
\textsuperscript{161} In fact, reliability was the chief value identified in Chief Justice Burger’s plurality opinion. See supra notes 137-39 and accompanying text.
\textsuperscript{162} For me this conclusion is inescapable considering the Chief Justice’s ease in proclaiming character, record, and offense as the only relevant considerations for a capital sentencer. See Lockett, 438 U.S. at 604-06; id. at 604 n.12. In defense of Chief Justice Burger, he apparently felt he was merely expanding on a relevance definition contained in Woodson. See id. at 604 (from “relevant facets” of the defendant’s character and record or the circumstances of the offense in Woodson, to “any aspect” of same).
\textsuperscript{163} If the character-record offense formula were sufficiently broad to encompass all relevant considerations, a mandatory sentencing system would come close to the goal of reliability. See infra note 167. It is possible that the sentencer might refuse to consider the relevant mitigating evidence proffered, but such an event would not represent a criticism of the relevance limitation on mitigating evidence. This relevancy approach, however, cannot be sufficiently broad. See infra pt. III.
eration of irrelevant factors that, in the language of Furman, lead to arbitrary results, are precluded.

Permissive sentencing statutes may plausibly be said to provide a greater degree of reliability than do mandatory statutes. The sentencer in a permissive system is free to consider and to impose a life sentence based upon any kind of consideration. Nevertheless, as argued above, this assurance of reliability is accomplished at the sacrifice of the value of non-arbitrariness that was so central in Furman. Mandatory statutes promise a greater degree of non-arbitrariness by seeking to limit the sentencer's consideration to relevant mitigating factors, while not sacrificing reliability because those relevant factors will be given full and complete consideration.

This account of how the mandatory language in the Pennsylvania statute can be understood contains serious, in fact fatal, con-

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166. That is, different results that do not coincide with differences among defendants in deserving the death penalty. See supra notes 52-74 and accompanying text.

167. Even though Chief Justice Burger attempted in Lockett to include all relevant factors in his admissibility formula, he would no doubt admit that any limitation on admissibility poses some risk that the death penalty will be imposed despite "factors which may call for a less severe penalty." Lockett, 438 U.S. at 605; see supra notes 154-63 and accompanying text. A permissive system that admits any possibly mitigating factors into evidence and permits them to be considered presents less of a risk, and hence is more reliable.

Ironically, states that have permissive death penalty statutes often still limit the admissibility of mitigating evidence to the confines of the Lockett formula. See, e.g., Franklin v. State, 245 Ga. 141, 263 S.E.2d 666 (1980). Cf. Christopher v. State, 407 So. 2d 198, 202 (Fla. 1981); Perry v. State, 395 So. 2d 170 (Fla. 1980). In such an instance, the state is in the peculiar position of permitting the sentencer to make decisions based on considerations deemed irrelevant, but not permitting such considerations to be raised formally.

168. See supra notes 89-95 and accompanying text.

169. Thus, the major objection to Lockett, that it undermined Furman, mistook the sentencing structure that Chief Justice Burger was trying to create. See supra note 123 and accompanying text. Whether successful or not, Chief Justice Burger was not knowingly giving up the "concern with capriciousness" since those spared would be so for relevant reasons. See The 1977 Term, supra note 56, at 106-37. See also Recent Developments, supra note 113, at 331 (Lockett sacrificed consistency for individualization). Although Justice Rehnquist criticized requiring the states to permit "anything under the sun" as mitigation, Lockett, 438 U.S. at 631, the Chief Justice's opinion demonstrates that this was not done in Lockett. Id. at 604 n.12. Justice White voiced the same objection. Id. at 622 (White, J., concurring in part and dissenting in part). Contrary to their expectations, Lockett has proved to represent both an expansion of mitigation, and a limitation. See supra note 147.

170. It is not clear how much, if any of this suggested justification for mandatory sentencing was in the minds of those who passed the present sentencing statute. The 1974 statute was a mandatory statute, but it is not clear why in 1978 the mandatory sentencing format was retained. See supra note 50. I am proposing a way of understanding what the legislature did, if not necessarily what they thought.
stitutional weaknesses. Mandatory statutes fail to fulfill the promise of a more coherent capital sentencing system for reasons both small and great. Part III will analyze some of these reasons, moving from the relatively minor, and hence possibly correctable, to the more significant—those that cast doubt upon the enterprise of justification of the death penalty begun in Furman and continued in Lockett.

III. INSUFFICIENT CONSIDERATION OF “FACTORS WHICH MAY CALL FOR A LESS SEVERE PENALTY”\textsuperscript{171}

As Gregg's approval of permissive sentencing shows, the Supreme Court has chosen consistently to place more emphasis upon protecting those who do not deserve to die, than upon ensuring that the equally reprehensible are treated equally. And though Chief Justice Burger sought to achieve both goals in Lockett,\textsuperscript{172} the entire structure of that opinion demonstrates that its starting point and major ground is reliability — the assurance that death is the appropriate punishment.\textsuperscript{173} Lockett's first promise is that a defendant is entitled to every legitimate argument to convince the sentencer to return a life sentence. The character-record-offense formula is just a way of defining which considerations are relevant. But the formula fails to guarantee consideration of all factors which may call for a less severe penalty. In the first place, the character-record-offense formula is too restrictive. In the second place, the Court has refused to create any standard by which to judge the relevance of proffered mitigating evidence and argument. Finally, the insistence upon a reason for mitigation is not a justifiable limitation upon sentencer discretion to return a life sentence. Because the concept of relevant mitigating circumstances is so flawed, requiring death unless relevant mitigating circumstances are found — the essence of the Pennsylvania mandatory scheme — fails to satisfy the Supreme Court's insistence upon a reliable death penalty sentencing system.

\textsuperscript{171} Lockett, 438 U.S. at 605.
\textsuperscript{172} See supra notes 160-69 and accompanying text.
\textsuperscript{173} See supra notes 135-39 and accompanying text.
A. Challenges to the Death Penalty and to Aggravating Circumstances

In order to demonstrate that the character-record-offense formula is too restrictive, and thus in a mandatory context that it creates a substantial risk of unreliable capital sentencing, one must show that a piece of proffered evidence or a line of proposed argument that is outside the formula is a proper ground upon which to reject the death penalty in a given case. Such a showing would invalidate the Lockett admissibility formula because the concept of relevance by its nature does not exclude appropriate evidence and because Lockett’s fundamental requirement that all factors calling for a less severe penalty be considered does not permit such exclusion.

In a series of cases, state courts have been called upon to decide whether defendants are permitted to introduce evidence at a sentencing hearing that attacks the general acceptability of capital punishment.174 A general challenge could also be made with respect to certain aggravating circumstances. Defense counsel could argue, for example, that even if present, certain aggravating circumstances are not sufficiently important to warrant death.175 While the Pennsylvania Supreme Court has yet to rule upon either issue, it is difficult to see how such evidence could be admitted under the mandatory structure of the Pennsylvania statute.176


176. Refusing the defendant the right to admit such evidence, or to make such arguments has been the general trend in both mandatory and permissive states. See supra note 174. Cf. supra notes 6-7. Such evidence is arguably outside the relevance limits in Lockett.

How courts in jurisdictions with permissive statutes justify such limitations on admissibility is difficult to understand. Cf. supra note 167. For example, in Mississippi, the sentencing jury is called upon to decide whether aggravating circumstances are “sufficient” and
The Pennsylvania statute defines admissible mitigating circumstances along the lines of the \textit{Lockett} character-record-offense formula. \textsuperscript{177} Thus the issue of admissibility of such evidence and argument would be, in formal terms, whether attacks on the death penalty or specific aggravating circumstances, concern a defendant's character, record, or the nature of the offense. Courts have generally answered this question in the negative, and excluded such evidence and argument. \textsuperscript{178} An argument could be made that even in terms of \textit{Lockett} these decisions are wrong because whether this defendant's character, record, and offense are such that he deserves to die, \textsuperscript{179} cannot be decided without reference to the larger issue of whether anyone deserves to die. Nevertheless, the character-record-offense approach is not phrased in a way that justifies the admission of such evidence. \textsuperscript{180}

There are two bases upon which to conclude that despite their exclusion by the \textit{Lockett} formula, attacks upon the death penalty and upon particular aggravating circumstances are proper considerations for a sentencer in a capital case. The first such source is the methodology the Supreme Court has used to evaluate eighth amendment challenges to the death penalty.

In assessing whether the death penalty was constitutional for

\textsuperscript{177} See supra note 164 and accompanying text.

\textsuperscript{178} See supra note 176. Cf. Utah v. Wood, 648 P.2d 71 (Utah 1982) (charge approved that jury must decide whether death penalty is "justified and appropriate in the circumstances").

\textsuperscript{179} See supra notes 148-49 and accompanying text.

\textsuperscript{180} Cf. Hertz and Weisberg, supra note 31, at 368-73 (exclusion of evidence of lack of deterrence and nature of retribution proper under character-record-offense formula, but improper under \textit{Lockett}'s general reasoning).
murder in Furman and Gregg and for rape in Coker v. Georgia,181 a majority of the Court has looked to whether juries generally refuse to impose the penalty in that class of case, even if legally warranted.182 This focus upon jury nullification has figured prominently as well in consideration by the Court of the constitutionality of death as punishment for felony murder.183 The Court’s approach recognizes rejection of the death penalty by juries in a certain class of cases, or even general rejection, as an important part of eighth amendment analysis.184 Thus, a jury’s general opposition to the death penalty, or opposition to a particular aggravating circumstance, is a legitimate consideration for imposing a life sentence.185 Accordingly, such views represent “factors which may call for a less severe penalty,” and under Lockett, a statute may not instruct the sentencer to ignore such factors.186 The Pennsylvania statute in effect instructs the sentencer to ignore

182. See Furman, 408 U.S. at 299 (Brennan, J., concurring); id. at 313 (White, J., concurring); id. at 339 (Marshall, J., concurring); Woodson v. North Carolina, 428 U.S. 280, 292 (1978) (Stewart, J., plurality opinion); Coker, 433 U.S. at 596-97; cf. id. at 603-04 (Powell, J., dissenting in part). The rejection of automatic death penalty statutes also proceeded in part from the unwillingness of juries to see capital punishment imposed. See Woodson, 428 U.S. at 295-96, 302-03 (Stewart, J., plurality opinion). The role of juries is attributed to that part of eighth amendment analysis that concerns the society’s “contemporary values.” Id. at 181; see also Coker, 433 U.S. at 596.
183. Enmund v. Florida, 102 S. Ct. 3368, 3375-76 (1982). The issue of the constitutionality of death as a punishment for the young was not reached in Eddings v. Oklahoma, 102 S. Ct. 869 (1982). The framing of that issue, however, leaves little doubt that jury reaction will play a substantial role in the ultimate resolution of whether the death penalty for a 16 year old is unconstitutional “in light of contemporary standards.” Id. at 874; cf. Woodson, 428 U.S. at 181.
184. For general accounts of the Court’s eighth amendment analyses, including the role of the sentencing jury, see Radin, The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause, 126 U. Pa. L. Rev. 989, 1034-56 (1978) [hereinafter cited as Jurisprudence of Death]; Liebman and Shepard, supra note 80, at 762-77. In concluding that death for rape of an adult woman represents a “grossly disproportionate and excessive punishment,” Justice White’s plurality opinion sought guidance from “objective evidence” (including jury verdicts) “of the country’s present judgment” on the issue. Coker, 433 U.S. at 593. Concerns with such “objective indicators of society’s evolving standards of decency,” id. at 603 (Powell, J., dissenting in part), commands a majority of the Court today, though obviously the Justices claim that their own judgment must also be brought to bear. See id. at 597-600 (White, J., plurality opinion). Cf. infra notes 238-48 and accompanying text.
185. While Supreme Court references to jury nullification concern general trends rather than individual cases, I do not see how a valid role for the jury in the aggregate, could somehow be illegitimate in the particular.
186. See supra notes 131-39 and accompanying text.
such attacks by not permitting a decision based on any considerations beyond mitigating circumstances — mitigating circumstances that do not appear to encompass general attacks upon the death penalty or upon aggravating circumstances. Thus, the Pennsylvania statute contains an unconstitutional limitation on mitigating evidence.

The second justification for evidence and argument attacking the death penalty and aggravating factors is the role Witherspoon v. Illinois creates for capital sentencing juries. Witherspoon concerned the power of a state to permit challenges for cause in jury selection on the grounds of general opposition to the death penalty. Justice Stewart, speaking for the Court, held that such a broad-based challenge for cause is an unconstitutional method by which to constitute a jury that imposes a death penalty.

It may be questioned whether Witherspoon applies to post-Gregg death penalty statutes. The Illinois death penalty statute

187. See supra notes 174-78 and accompanying text.
188. 391 U.S. 510 (1968).
189. An Illinois statute permitted a challenge for cause to "any juror who shall, on being examined, state that he has conscientious scruples against the death penalty, or that he is opposed to same." Id. at 512. At Witherspoon's murder trial, "nearly half" of the venire panel was eliminated by challenges for cause under the statute. Id. at 513.
190. Justice Stewart also held that the petitioner had not established that a jury selected in such a manner was "biased in favor of conviction." Id. at 516-18. The conviction-proneness argument has raged ever since. See White, Death-Qualified Juries: The "Prosecution-proneness" Argument Reexamined, 41 U. Pitt. L. Rev. 353 (1980). See also Hovey v. Superior Court, 28 Cal. 3d 1, 168 Cal. Rptr. 128 (1980). A related controversy has continued since Witherspoon about whether a death qualified jury can fulfill a criminal defendant's constitutional right to a jury drawn from a fair cross section of the community. See Colussi, The Unconstitutionality of Death Qualifying a Jury Prior to the Determination of Guilt: The Fair-Cross-Section Requirement in Capital Cases, 15 Creighton L. Rev. 565 (1982).
191. 391 U.S. at 522. "[W]e hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty, or expressed conscientious or religious scruples against its infliction." Such a jury was not impartial. Id. at 518.

Justice Stewart did not address the issue of whether the prosecution could use peremptory challenges against potential jurors on a basis broader than that approved in Witherspoon for challenges for cause. In Adams v. Texas, 448 U.S. 38 (1980), Justice White, speaking for the Court, referred to peremptory challenges as a ground for exclusion "having nothing to do with capital punishment." Id. at 48. Those challenges that do have something to do with capital punishment must follow Witherspoon. Id. at 49. Thus, in regard to peremptory challenges, the prosecution might not be permitted to challenge on the ground of juror antipathy to the death penalty that does not rise to the standard articulated in Witherspoon. But see Jordan v. Watkins, 681 F.2d 1067, 1070 (11th Cir. 1982).
gave the jury complete discretion to impose the death penalty. Under such a system, the jury "can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death." A jury selection system that removed potential jurors because of general reservations about the death penalty could not speak for a community in which a substantial percentage of people harbor serious doubts. All a state might do is eliminate for cause potential jurors who make it "unmistakably clear" (1) that they would automatically vote against the death penalty no matter what the evidence or (2) that their attitudes about the death penalty would prevent an impartial decision on guilt or innocence. Because this holding is premised upon essentially unlimited discretion to impose the death penalty, Witherspoon's requirements might not reach post-Gregg statutes under which sentencers' discretion is supposedly limited.

Adams v. Texas, a case which applied Witherspoon to the Texas sentencing statute— one in which jury discretion was certainly limited— has affirmed a more fundamental role for juror values under death penalty statutes. Justice White, speaking for the majority, noted that the capital jury's role in Texas is "more limited" than under the Illinois system, but concluded that Witherspoon nevertheless "applies" in full. In applying Witherspoon to post-Gregg statutes, the Court is assuming that one rule for the sentencing jury in every capital case is to "express the conscience of the community on the ultimate question of life or death."

192. 391 U.S. at 519.
193. Id. at 520.
194. Justice White emphasized that the Witherspoon opinion actually did not provide grounds for exclusion. Rather Witherspoon is "a limitation on the state's power to exclude." Adams, 448 U.S. at 48.
197. Texas required members of the venire to take an oath that the Texas mandatory death penalty would not "affect [their] deliberations on any issue of fact." Id. at 40 (quoting Tex. Penal Code Ann. § 12.31(b) (1974)). The Court held that alternatives to exclusion for cause could not be used to exclude potential jurors because of their views on capital punishment, unless such exclusion is no broader than Witherspoon itself. 448 U.S. at 48-49.
198. See supra note 32.
199. 448 U.S. at 46.
200. Id. at 47 & n.4. Thus, the Texas exclusion system must work "consistently" with the Witherspoon standard.
201. Witherspoon, 391 U.S. at 519-20.
Witherspoon entitles a capital defendant to make arguments inconsistent with the Lockett formula. In expressing the community’s conscience, the Witherspoon opinion entitled the defendant to jurors who were absolutely opposed to capital punishment in certain kinds of cases. Apparently, therefore, a juror who is opposed at the start to one or more aggravating circumstances cannot be excluded for cause. Furthermore, the state may not exclude persons generally to capital punishment. All that may be asked is that the juror be willing to consider the prosecution’s arguments for death in some types of capital cases. Thus, Witherspoon permits challenges for cause to members of the venire who oppose capital punishment in certain kinds of murder cases, if the potential juror happens to oppose the death penalty in the type of case that is in fact to be tried by that jury. See Williams v. Maggio, 879 F.2d 381 (5th Cir. 1989); Magill v. State, 386 So. 2d 1188, 1189-90 (Fla. 1980). Though there is a surface appeal to such a position, it contradicts Witherspoon's language directly and is untrue to Witherspoon's formulation of the role of the jury. In Maggio, for example, the Court suggested that an exclusion for cause was valid for someone opposed to capital punishment for robbery-murder. Id. at 386. But a judgment rejecting felony murder as an appropriate aggravating circumstance represents the way that the jury “maintain[s] a link between contemporary community values and the penal system . . . .” 391 U.S. at 519 n.15. It is not the jury’s role to rubberstamp legislative judgment. The eighth amendment requires that the jury participate in the process by which punishment reflects the community’s “evolving standards of decency.” Id. (quoting Trop v. Dulles, 356 U.S. 86 (1958)).

203. That is, persons who “expressed conscientious or religious scruples against capital punishment and all who opposed it in principle . . . .” Witherspoon, 391 U.S. at 520.

204. The most that can be demanded of a venireman [in regard to his position on the death penalty] is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. Id. at 522 n.21 (emphasis in original). See, e.g., Burns v. Estelle, 592 F.2d 1297, 1300 (5th Cir. 1979).

There is some doubt upon the continued vitality of this language, based on Adams v. Texas, 448 U.S. 38 (1980). See 12 Tex. Tech. L. Rev. 764, 780-81 n.163 (1981); See also Comment, Proposals to Balance Interests of the Defendant and State in the Selection of Capital Juries: A Witherspoon Qualification, 59 N.C.L. Rev. 767, 786-88 (1981). Justice White emphasized the state’s legitimate interest in removing for cause jurors who would, or could, not follow their oath, instructions, or more generally, the law. Adams, 448 U.S. at 45, 48-49. Jurors must be willing to accept death as an acceptable penalty “in certain circumstances.” Id. at 46. Thus, Texas could require an oath that jurors were willing to follow the law. Id. at 48-49. This much had already been made clear in Lockett v. Ohio, 438 U.S. 586, 595-96 (1978) (upholding a similar jury oath).
spoon gives to the defendant a right to jurors opposed specifically to an aggravating circumstance and opposed generally on religious or philosophical grounds to the death penalty. Furthermore, the language of Witherspoon expressing these views suggests strongly that jurors may not be precluded from acting upon such views.268 Justice Stewart’s reference to Witherspoon in Gregg, specifically

In following a mandatory death penalty statute, however, one is bound to do more than consider the death penalty; the juror must vote to impose the death penalty if the statutory conditions are met. Does this mean that juries are no longer to bring their judgments about capital punishment to bear?

In his dissent in Adams, Justice Rehnquist pointed out the inconsistency in the majority’s position that Texas could require fidelity to law but that Witherspoon nevertheless applies. In Witherspoon, the death penalty statute required discretion and judgment. In Adams, the Texas statute required little or no jury discretion. The jury was simply to answer objective questions. If the state had a legitimate interest in having jurors follow the law, views about capital punishment would be irrelevant and Witherspoon would not apply. Id. at 52-55 (Rehnquist, J., dissenting).

By applying Witherspoon in the face of the logic of Justice Rehnquist’s dissent, the majority was denying the right of Texas to give the jury tasks to perform in regard to imposing capital punishment, while insisting that general views on the subject have no role to play. Justice White referred to the jury role as “not an exact science” and concluded that “a Texas juror’s views about the death penalty might influence the manner in which he performs his role...” Therefore Witherspoon applied. Id. at 46-47. While this observation was qualified (“but without exceeding the ‘guided jury discretion’... permitted him under Texas law”), the legislature’s attempt to remove opinions about capital punishment from the jury’s considerations failed.

How can it be that jurors may be required before the trial to take an oath to obey the law, but then, because of opposition to the death penalty, may refuse at the sentencing hearing to obey the literal statute by not answering honestly a clear and objective question about future danger? See Jurek v. Texas, 428 U.S. 262, 275 (1976); see supra note 31. (If these questions are answered in affirmative, death penalty is automatic. The only question about which a defendant will be likely to have an argument, given the murder conviction, is “whether there is a possibility that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.”) Although the Court’s position is unclear, I think the reason the Court accepts the inconsistency involves the irrevocability of excluded jurors’ opposition to the death penalty. See Witherspoon, 391 U.S. at 522 n.21. The prosecution is entitled to a presumption that a death penalty statute, even a mandatory one, represents evolving community standards. Those absolutely unwilling at the beginning of the trial to defer to this legislative judgment are excluded. But the defendant is then permitted to attempt to undermine the jury’s acceptance of legislative judgment by attacks on the death penalty. This is why the Court applies Witherspoon even in Texas, where general views about the death penalty should, by the wording of the statute, have no role to play in capital sentencing. While Adams may represent an uneasy compromise for the Court, the case nevertheless supports the right of a defendant in any capital case, under any statute, to try to influence the jury’s “views about the death penalty,” Adams, 448 U.S. at 46.

205. The jury is to “speak for the community,” Witherspoon, 391 U.S. at 520, and “express the conscience of the community,” id. at 519.
his mentioning jury sentencing as a way the death penalty satisfies the evolving standards of the eighth amendment,206 brings the Witherspoon apparatus into the minimum requirements for valid death penalty statutes.207 Thus jurors in death penalty cases must be permitted to return life sentences based upon general opposition to the death penalty—once contrary arguments are considered, and also upon absolute opposition to one or more aggravating circumstances. The Pennsylvania death penalty statute permits neither choice, and hence is unconstitutional.

Of course these arguments are intended to demonstrate only that the character-record-offense formula is too narrow. Certainly it could be reformulated and expanded.208 These arguments do not undermine the attempt to define irrelevant reasons for a sentencer’s decision to impose a life sentence. However, relevance itself is a category without substantive content in Supreme Court death penalty opinions. The Court has failed to articulate a substantive penological theory of who deserves to die. Capital sentencing decisions as the Supreme Court understands them, rest simply upon will—the will of the community as expressed by a jury. No limit of relevance upon the community’s will to spare a defendant is justified by the Court’s reasoning in death penalty cases.

B. Exclusion of “Irrelevant” Mitigating Evidence

It is easy to see that any relevance formula that excludes certain kinds of evidence and argument from a death penalty hearing rests upon an assumption that some reasons through which a sentencer might be persuaded to return a life sentence are not appropriate.209

206. Gregg, 428 U.S. at 190.
207. That is not to say that jury sentencing is required in capital cases. Justice Stewart called it merely “desirable” in accommodating the eighth amendment requirement of deference to evolving community standards. See id. Apparently there are other ways. But when a jury is utilized, Witherspoon defines the jury’s role as that of establishing community standards.
208. The Pennsylvania statute easily could expand the Lockett formula to include challenges to the death penalty generally and to specific aggravating circumstances. Lockett does not mandate exclusion of evidence deemed by the court to be irrelevant. See supra note 146.
209. For example, if polygraph evidence is excluded, it means that a jury should not be persuaded by such evidence, but might be nevertheless. See Christopher v. State, 407 So. 2d 198, 202 (Fla. 1981). Under Lockett, any evidence not relating to character, record, or offense, is not an appropriate reason for imposing a life sentence. See supra notes 140-49 and accompanying text.
To decide what an appropriate reason is for a life sentence, one must first have a theory that explains why someone does or does not deserve to die. The Lockett character-record-offense formula does not present a persuasive theory of who deserves to die. The character-record-offense formula is too narrow to permit consideration of all legitimate reasons for returning a life sentence.\textsuperscript{210} But Lockett is also too broad. One can imagine arguments that the Lockett formula literally would admit that courts probably would consider improper. With reference to the circumstances of the offense, defense counsel could attempt to argue that the victim in that case was black or Jewish and that is not as bad as harming white people. Not only do arguments such as these fit well within the character-record-offense formulation, but research indicates that, far from unpersuasive, the race of the defendant and victim have been a reliable predictor of outcome in death penalty cases.\textsuperscript{211} Nevertheless, I do not think that trial courts would permit such appeals.\textsuperscript{212} No doubt Chief Justice Burger also would consider such appeals improper, and would call them irrelevant, despite the Lockett formula.

The Georgia Supreme Court has offered, implicitly, simple jury persuasiveness as an alternative admissibility test to Lockett.\textsuperscript{213} State courts occasionally must decide whether to permit a defendant to offer evidence in the sentencing hearing that his parents love him and would be devastated by his execution. In Houston \textit{v. State},\textsuperscript{214} the Tennessee Supreme Court held that such evidence had been properly excluded under Lockett.\textsuperscript{215} In Cofield \textit{v. State},\textsuperscript{216} the prosecution argued that evidence that a mother loves her son and does not want to see him die did not relate to the defendant's character or record, nor to the circumstances of the offense.\textsuperscript{217} The Georgia Supreme Court avoided the Lockett issue,

\begin{itemize}
\item \textsuperscript{210} See supra pt. III, sec. A.
\item \textsuperscript{211} See Reisel, \textit{Race Bias In the Administration of the Death Penalty: The Florida Experience}, 95 Harv. L. Rev. 456, 459-60 (1981). But see Excessive Sentencing, supra note 91, at 23-31; id. at 23 n.75; Dade County, supra note 112, at 87-90.
\item \textsuperscript{212} Cf. supra notes 158 and 174.
\item \textsuperscript{213} See infra notes 210-20 and accompanying text.
\item \textsuperscript{214} 593 S.W.2d 267 (Tenn. 1980).
\item \textsuperscript{215} Id. at 275. See also State \textit{v. Pinch}, 306 N.C. 1, 292 S.E.2d 203 (1982); Perry \textit{v. State}, 395 So. 2d 170 (Fla. 1980).
\item \textsuperscript{216} 247 Ga. 95, 272 S.E.2d 530 (1980).
\item \textsuperscript{217} Id. at 110, 274 S.E.2d at 542.
\end{itemize}
but decided that the evidence was admissible nevertheless.\footnote{218}

The reasoning of the Georgia Supreme Court illustrates the need for a theory of what it means to deserve the death penalty before one can decide whether a certain piece of mitigating evidence should be admissible. The court acknowledged that the defendant was simply "appealing to the mercy of the jury," but that was not considered an improper approach to mitigation under the Georgia statute.\footnote{219} The inference is that whatever causes the jury to extend mercy is admissible.

The response of the Georgia Supreme Court in \textit{Cofield} is consistent with the jury's unfettered discretion to return a life sentence under Georgia's permissive death penalty statute. If the jury is permitted to return a life sentence for any reason, then any reason for life must be admissible into evidence.\footnote{220}

The Tennessee court's refusal to admit similar evidence in \textit{Houston} is also consistent with that death penalty statute's structure. A mandatory statute presumes that some reasons for life are not relevant to the sentencing decision. A mother's love could be one such irrelevant reason for life, but only if the Tennessee court could explain why someone who is so loved is as deserving of death as one who is not. A reference to \textit{Lockett} is not sufficient because, as argued above, the \textit{Lockett} formula does not stand for any such theory.

Up to this point, and with the exception of relating capital punishment to causing or intending death,\footnote{221} courts have failed to identify any theory of deserving to die, beyond the will of a sentencer. Attempts to describe the concept of mitigating evidence have, for this reason, yielded either incoherence, or deference to

\footnote{218} \textit{Id.} In \textit{Cofield}, though the trial judge agreed with the prosecutor in front of the jury that such evidence was not proper mitigating evidence, the evidence was admitted. The jury was not instructed to disregard the testimony, and defense counsel referred to the testimony in his closing argument. The court held the trial judge's incorrect characterization to be "harmless beyond a reasonable doubt." \textit{Id.}

\footnote{219} \textit{Id.}

\footnote{220} This is not to suggest that there is any state court consistency in approaching admissibility of mitigating evidence. See supra notes 167 and 175-76 and accompanying text.

\footnote{221} The United States Supreme Court is, apparently, in the process of establishing an independent theory of proportionality that limits the death penalty to one who causes, attempts to cause, or intends to cause death. See \textit{Enmund v. Florida}, 102 S. Ct. 3368, 3376-79 (1982); \textit{Coker v. Georgia}, 433 U.S. 584 (1977); \textit{cf. Lockett}, 438 U.S. at 624 (White, J., concurring); \textit{Gregg}, 428 U.S. at 187.
the jury. An example of incoherence is Justice White's reference in
*Coker v. Georgia* to a jury charge that mitigating circumstances are circumstances "which, in fairness and mercy, may be consid-
ered as extenuating or reducing the degree of moral culpability."
While this definition has been repeated, it, and others like it, define one unknown by reference to another. Such definitions simply assume that someone, presumably the sentencer, understands whether someone deserves to die.

Other courts suggest openly that mitigation is whatever convinces the sentencer to return a life sentence. This was the view of the Georgia Supreme Court in *Cofield*. In *Spivey v. Zant*, the Fifth Circuit misstated the *Coker* definition of mitigation as "fairness or mercy," thus perhaps indicating, as in *Cofield*, that any persuasive argument that leads to mercy is appropriate. In 1976, the Mississippi Supreme Court adopted a definition of mitigation that permitted "the introduction of compassionate or mitigating factors." The Colorado Supreme Court in 1979, alluding specifically to jury persuasion as defining mitigation, insisted that mit-

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223. Id. at 591. Justice White was repeating the definition of a mitigating circumstance given by the trial court in *Coker*.
225. See, e.g., *State v. Irwin*, 304 N.C. 93, 100, 282 S.E.2d 439, 446-47 (1981) mitigating circumstances are:
a fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of the crime of first-degree murder, but which may be considered as extenuating, or reducing the moral culpability of the killing, or making it less deserving of the extreme punishment than other first-degree murders.
*Hasey v. State*, 261 Ark. 449, 455, 549 S.W.2d 73, 79 (1977) "[A] mitigating circumstance is one which does not excuse the offense in question but which, in fairness and mercy, may justify your imposing less than the maximum possible sentence." See also *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981).
226. Not all courts agonize over the definition of mitigation. See *State v. Grossoe*, 615 S.W.2d 142, 148 (Tenn. 1981) ("mitigating" is a "word of common usage" and there is no need for trial judge to define the concept in jury instructions).
227. 661 F.2d 464 (5th Cir. 1981).
228. Id. at 471 n.8 (emphasis added).
229. *Jackson v. State*, 337 So. 2d 1242, 1253 (Miss. 1976) (reference to "compassionate or mitigating factors"). The distinction between mitigation and mercy, though not, to my knowledge, articulated, has a curious resilience. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Perhaps there is an inarticulate feeling among courts that mitigation may be considered a legal term of art, while mercy or compassion represent an undefinable grant of grace by jury. Cf. *Gregg*, 428 U.S. at 203, 222.
gating circumstances must be defined broadly to include "factors which a jury might . . . consider mitigating and, as a result might [be] moved to impose a life sentence." 230

A similar result is reached when one attempts to relate the concept of relevant mitigating evidence to the Supreme Court's justification for the death penalty. A recent article attempted to define mitigating circumstances in terms of the Court's opinion in Gregg. 231 The death penalty was upheld in Gregg in part because it served the penological goals of retribution and general deterrence. 232 Accordingly, a mitigating circumstance is any information tending to show that the goals of retribution and deterrence would not be served by the imposition of capital punishment in a given case. 233 While this proposal is consistent with the Court's eighth amendment analysis, the references in Lockett to the "degree of respect due the uniqueness of the individual" 234 do not seem compatible with sentencing based upon a principle of general deterrence, which would sacrifice an individual for the effect the execution would have upon others. 235 Nevertheless, whatever part deterrence theory ultimately plays, 236 Chief Justice Burger would no doubt assent to a definition of mitigation that links execution to

231. Liebman and Shepard, supra note 80, at 784-85, 817-21.
232. Liebman and Shepard present their analysis of Gregg in the following terms: Public attitudes support the death penalty, as does the concept of human dignity. Id. at 763, 766. Substantively, human dignity requires that the death penalty serve recognized penological justification and not be disproportionate to the crime for which it is imposed. Id. at 767-68. Procedurally, human dignity requires individualization in sentencing, that is consideration of the defendant's character and record and the circumstances of the offense. Id. at 772. In addition, there must be legislative guidance of the sentencer's decision. Id. at 773. There are, of course, other accounts of Gregg and the other July 2nd cases that differ somewhat from this account. See, e.g., Hertz & Weisberg, supra note 31, at 320-22; Jurisprudence of Death, supra note 184.
233. Liebman and Shepard, supra note 80, at 810-19.
234. 438 U.S. at 605.
235. See Lempert, supra note 78, at 1187-88. In fact, as Professor Lempert points out, deterrence, or net social gain, as a basis for supporting capital punishment is attractive precisely because it disregards the inevitable biases and distortions inherent in the death penalty's administration.
236. The problem with deterrence is, aside from its uninspiring moral foundations, that it is highly unlikely that capital punishment, as we know the institution today, prevents any murders at all, and virtually a certainty that it causes more misery than it prevents. See supra note 235. See also Lempert, supra note 78, at 1187-1225.
the need for retribution in a particular case.\textsuperscript{237} But when the Supreme Court discusses retribution\textsuperscript{238} in capital cases, the Justices mean merely that the community desires or does not desire death in a particular case.\textsuperscript{239} Thus when, in \textit{Gregg}, Justice Stewart approved of retribution as a permissible ground for a legislative determination that the death penalty should exist, he described the operation of retribution as expressing "the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."\textsuperscript{240} Justice Stewart further justified retribution

\textsuperscript{237} It may be that Chief Justice Burger's use of the term "appropriate punishment" in \textit{Lockett}, 438 U.S. at 601, does not limit consideration to retribution, but neither is there any reason to think that retributive principles are not a key element in considering such appropriateness. \textit{See supra} note 149. \textit{See also} Gillers, \textit{supra} note 3, at 50.


\textsuperscript{239} Ironically, what is missing from Supreme Court capital cases is the very thing that the Justices claim they must do, judge for themselves whether the death penalty represents "cruel and unusual punishment." \textit{See supra} note 5, at 65. For example, though acknowledging in \textit{Gregg} that judges have a role to play because the eighth amendment is a limit on majority power, Justice Stewart made an independent judgment only about whether death "is disproportionate in relation" to murder. \textit{Gregg}, 428 U.S. at 173. 187. There is no decision by Justice Stewart whether the death penalty is in accordance with the "dignity of man," an inquiry he acknowledges to be a "proper one," but one which he reduces to excessiveness. \textit{Id.} at 173. Professor Radin is right to insist that, pursuant to moral limits on retributive impulses, "any punishment that fails to respect the personhood of the offender is unjustified." \textit{Super Due Process, supra} note 56, at 1184. Justice Stewart ignores personhood in \textit{Gregg}. Justice White's opinion in \textit{Coker} also demonstrates the unwillingness of the Court to examine the death penalty from the perspective of personhood. Justice White discusses gross disproportionality and excessiveness only, and from the perspective of an entirely independent judgment, proportionality only. \textit{Coker}, 433 U.S. at 597. \textit{See infra} note 244.

Of course, it may be that \textit{Gregg} represented an implied holding that the death penalty is a proper penalty—one that respects human worth. If so, that judgment should have been argued formally, or at least presented. There is a great deal to be said on the other side. \textit{Super Due Process, supra} note 56; \textit{Lempert, supra} note 80; \textit{Furman v. Georgia}, 408 U.S. 240, 270-74 (1972) (Brennan, J., concurring).

\textsuperscript{240} \textit{Gregg}, 428 U.S. at 184. The reader should note that Justice Stewart is not making a claim here about reality or even about his own views. He is not claiming that death is "the only adequate response" to some crimes, only that the community thinks so. For all we know, Justice Stewart thinks the community is horribly misguided. \textit{Cf. Fletcher, Two Modes
by pointing out the consequences of frustrating society's instinct for retribution.\textsuperscript{241}

The Court has not attempted to formulate a theory of retribution that goes beyond this expression-of-popular-will theme.\textsuperscript{242} The obvious implication of this approach is that if society is satisfied not to kill someone, retribution would not be served by killing him. And the fact that retribution would not be served by an execution appears to be viewed by the Court as a legitimate reason for not imposing the death penalty.

If the sentencer is conceived of as representative of the community's perspective,\textsuperscript{243} retribution, and through it the decision to return a death sentence, loses all substantive content.\textsuperscript{244} Whenever the sentencer is convinced that death is not the appropriate punishment, then by definition, retribution is not served by a death sentence. Whatever convinces the sentencer becomes the only proper definition of mitigation.

Such a definition of mitigation leads to essentially open admissibility in death penalty sentencing hearings. To return to \textit{Houston}, it may be that presenting evidence of the effect of the defendant's execution upon his parents is nothing more than an outrageous ap-

\textit{of Legal Thought}, 90 \textit{Yale L.J.} 970, 972 (1981) (distinguishing first order or substantive claims from descriptions of the views of others).

\textsuperscript{241} Gregg, 428 U.S. at 183. "The instinct for retribution is part of the nature of man." \textit{id.} If the state does not execute horrible murderers, it risks the breakdown of reliance on the criminal justice system and the growth of self-help: lynchings, private revenge and so forth.

\textsuperscript{242} The Justices have never said, for example, why the murderer who has tortured his victim deserves to die, but does not deserve to be tortured to death. I am confident the Court would so hold, but if retribution from the community's viewpoint is a sufficient goal it is hard to understand why torture might not be an appropriate penalty. Such a penalty would be proportionate, which is the only independent judgment the Court has rendered.

\textsuperscript{243} This is certainly how Justice Stewart viewed the jury in \textit{Gregg}: "The jury also is a significant and reliable objective index of contemporary values . . . ." \textit{Gregg}, 428 U.S. at 181. \textit{See also id.} at 190. The jury role in death penalty sentencing has in fact been suggested as a way to keep capital punishment abreast of the eighth amendment's evolving standard. \textit{See, e.g.,} 1977 \textit{Term, supra} note 56, at 108.

\textsuperscript{244} \textit{Cf.} Justice White's concurrence in the judgments in \textit{Lockett}, 433 U.S. at 624-26 (White J., concurring) and in \textit{Bell v. Ohio}, 438 U.S. 637, 643 (1978) (White, J., concurring). Justice White, citing \textit{Coker} for the test of cruel and unusual punishment, stated that a punishment is unconstitutional if (1) it makes no measurable contribution to penological goals, and hence represents needless suffering and (2) if punishment is disproportionate. Justice White was willing to make his own judgment about satisfaction of the penological goal of deterrence, but not that of retribution. In the case of retribution Justice White looked to how often juries impose the death penalty, and how often it is actually carried out. \textit{Id.} at 624-25.
peal to the sympathy of the jury. But retribution, as the Court understands it, is nothing more than an emotional response by the community. If the jury is moved to spare the defendant because of his mother's plea, then this is the fairest gauge of the extent of the community's desire for retribution. Similarly, all the many controversies over mitigating evidence, from the co-defendant's plea bargain to descriptions of an actual execution, should be resolved in favor of admissibility, since all may restrict the community's desire to inflict the death penalty, which is a factor calling for a lesser penalty.

Recognition that any persuasive mitigating evidence must be admitted into evidence in a death penalty hearing invalidates the mandatory statute methodology of excluding irrelevant reasons for death in order to lessen arbitrariness. If retribution is merely an expression of emotion, the community's "feeling" about what the defendant deserves, then the only test of relevance is the purely tautological: what influences the jury is relevant — what does not influence the jury is not relevant. Thus, no evidence could be excluded from consideration except upon the ground that the jury


247. A variety of issues have arisen as to what is admissible as mitigating evidence. See, e.g., Collier v. Georgia, 244 Ga. 553, 261 S.E.2d 264 (1979) (exclusion of evidence of present character not error); Magill v. State, 386 So. 2d 1199 (Fla. 1980) (present state of mind may not be relevant).

248. In order to show that such evidence is always admissible, it is not necessary to assume that if the penological value of retribution is not satisfied, deterrence alone is not a sufficient reason to impose the death penalty in a particular case. In order to be considered a mitigating circumstance, evidence must only represent a factor calling for a less severe penalty. Lockett, 438 U.S. at 605. The fact that a piece of mitigating evidence is not sufficient, even in theory, by itself to require life, is not a ground for exclusion. Thus undermining retribution is sufficient for admissibility even if deterrence remains an available justification. Nevertheless, I doubt that the death penalty would have been upheld if the uncertain foundation of deterrence had been its only justification. Cf. Gregg v. Georgia, 428 U.S. 153, 183-87 (1976).
would not be influenced by it. No persuasive evidence can be excluded. There is no impermissible evidence for a mandatory statute to exclude from consideration. Any relevance formulation, such as the one implicitly contained in mitigating factor number eight of the Pennsylvania death penalty statute, excludes factors calling for a less severe penalty and creates a capital sentencing system too unreliable to be constitutional.

C. The Requirement of Reasons

There is one remaining aspect of the Pennsylvania death penalty statute to be discussed. Even if the Pennsylvania statute admitted all evidence and arguments sought to be introduced and argued by a capital defendant, the Pennsylvania statute would still be unconstitutional because it requires death unless the jury finds the presence of a mitigating circumstance. The effect of this provision is to require more than the presence of a mitigating circumstance. The Pennsylvania statute requires that a juror be able to articulate a mitigating circumstance and find it proved by a preponderance of the evidence before the cir-

249. The exclusion of evidence considered irrelevant, and the requirement that the sentencer base the decision of life and death only on aggravating and mitigating evidence admitted into evidence and charged in instructions is the major difference between mandatory and permissive death penalty statutes. See supra notes 154-69 and accompanying text.


251. Exclusion of such evidence violates Lockett’s “first promise,” that the defendant may introduce into evidence and argue to the sentence any legitimate argument for life. See supra notes 131-39, 171-73 and accompanying text. Since any persuasive evidence is legitimate, none can be excluded.


253. Articulation requires that the mitigating circumstance be the subject of proof at the sentencing hearing; that is, someone other than the sentencer must consider the evidence to be mitigating. See Miller v. State, 605 S.W.2d 430, 438 (Ark. 1980) (trial judge should charge only aggravating and mitigating circumstances as to which there is some evidence). The requirement of finding a mitigating circumstance also means that the sentencer must himself consciously recognize the factor. See State v. Pinch, 306 N.C. 134, 292 S.E.2d 203, 236 (1982) (Exum, J., dissenting) (mitigation may be “inarticulable” and “intangible”). See infra notes 257-82 and accompanying text.

254. The requirement of proof can be a serious hurdle. See, e.g., Ruiz v. State, 355
cumstance may serve as a basis for returning a life sentence. That is, the statute requires evidence of the juror’s mental process. The statute presumes rational discourse in evaluation of the sentence. This discourse is to include all relevant, that is, all persuasive, information. It presumes the jury able to describe the factors influencing their judgment. It also presumes that the reasons given are the “real” reasons for the decision.

There is serious doubt as to the accuracy of this model of human decision-making. Karl Llewellyn recognized the uncertain role played by reasons for decision in the context of appellate decision-making in The Common Law Tradition:

[Psychologists began to look into how people go about reaching decisions . . . . Roughly they arrived at the conclusion that . . . it was seldom that the actual deciding was done by way of formal and accurate deduction in the manner of formal logic. The common process was rather one either of sudden intuition — a leap to some result that eased the tension; or else it was one of successive mental experiments as imagination developed and passed in review various possibilities until one or more turned up which had appeal. In any ordinary case a reasoned justification for the result represented a subsequent job, testing the decision against experience and against acceptability, buttressing it and making it persuasive to self and others.

Llewellyn doubted that a “well reasoned decision” could mean “a reasoned and rational deciding.”

Does the Supreme Court believe that the average juror can state, or even know, why he or she votes for life imprisonment? It is more likely that a juror goes into the jury room with a “feeling”


255. With delicious irony, whether intended or not, one student note refers to guided discretion statutes as creating a “rationalized sentencing process.” Review of Supreme Court Decisions, supra note 80, at 261. The Supreme Court has made much the same claim. See Woodson v. North Carolina, 428 U.S. 280, 303 (1976).


258. Id.
whether the death penalty should be imposed. Under a permissive statute, if a juror does not wish to impose the death penalty, the juror may simply state the wish and refuse to vote for death. Under the Pennsylvania statute, however, the refusal of such a juror to vote for death would be a violation of the obligation to obey the law, unless the juror could reduce that feeling to a "mitigating circumstance."

The reader should note the premium the Pennsylvania statute places on verbal skills. A juror's sense of dread always may be placed verbally into an appropriate mitigating category, if the juror has the necessary verbal skill. For example, the juror, just before retiring to deliberate, may have caught the eye of the defendant and, for the first time, may have recognized the defendant as a fellow human being. The juror may have felt a bond of kinship with the defendant at that moment that rendered the death penalty an impossible choice. A verbally articulate juror might say of such a feeling, "I have become convinced from all the evidence that the act was a product of the defendant's deprived history and


260. A particular jury's "willingness to act lawlessly" has not been considered a reliable basis for determining the appropriateness of the death penalty. See Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

261. The Supreme Court, or at least the plurality supporting guided discretion statutes, assume that sentencers will know the reasons for their decisions. Mandatory statutes, which limit the grounds upon which the sentencer may decide upon a life sentence, make the same assumption about mitigating circumstances. But if sentencers do not know why they are inclined either for a life sentence, or for the death penalty, these required references to specified, or charged, circumstances are more a facade than the description of decision-making they purport to be. Running a risk of an inability to specify an appropriate mitigating circumstance, when such specification may be unrelated to the information actually influencing the sentencer, certainly introduces a risk that an inappropriate sentence will be given. While I do not make any claim of sufficient scientific research in this area, there is at least some reliable indication that in fact we are highly inaccurate in knowing, and reporting what factors influence our decision-making. See Nisbett and Wilson, Telling More Than We Can Know: Verbal Reports on Mental Processes, 84 PSYCHOLOGICAL REV. 231 (1977).

262. The process of somehow humanizing the defendant is recommended by experienced capital trial attorneys as the most effective death penalty hearing strategy. See, e.g., Balase, New Strategies For The Defense of Capital Cases, 13 AKRON L. REV. 331, 332, 356 (1979).
that he can be treated and reformed, and I consider this a mitigating circumstance of such importance that it outweighs the aggravating circumstances." Another juror, not so articulate, might stand mute, haunted by the defendant's look but unable to manufacture a reason for life. Jurors may experience mercy simply as a whim.  

Supreme Court precedent recognizes that mitigation really is not a "fact" to be proven. In his concurrence in Gregg, cited by Chief Justice Burger in Lockett, Justice White noted that there may be mitigating circumstances "too intangible" to be listed in a death penalty statute. This may be the reason why Justice Stewart distinguished in Woodson between "compassionate" and "mitigating" factors while asserting that a jury could not be precluded from considering either in deciding whether to inflict capital punishment. A look, a feeling, a doubt, a general attitude of generosity and solidarity in the face of death — these are all intangible to be sure. But in the end they may be the most persuasive, though unarticulated, factors to a juror.  

The requirement of a reason does not alter the willingness or unwillingness of a juror to impose a sentence of death. If under Supreme Court precedent deserving a life sentence means simply that the sentencer wishes to impose it, the requirement of a reason adds nothing of value to the sentencer's decision. If the sen-

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263. See Smith v. Balkcom, 660 F.2d 573, 579-81 & n.23 (5th Cir. 1981) ("whimsical doubt" may serve as basis for a recommendation of mercy).  
265. 428 U.S. at 304. See supra note 229.  
266. See Smith v. Balkcom, 660 F.2d 573, 579-81 (5th Cir. 1981); id. at 581 n.23; Gray v. Mississippi, 375 So. 2d 994 (Miss. 1979).  
267. See Washington v. Watkins, 555 F.2d 1346, 1375-76 & n.57 (5th Cir. 1981); ("The exercise of mercy, of course, can never be a wholly rational, calculated, and logical process." The court did not reach the issue whether Lockett applies "when there are no objective, articulable, nonstatutory mitigating factors."). See also People v. District Court, 196 Colo. 401, 407, 586 P.2d 31, 35 (1978).  
269. See supra notes 238-49 and accompanying text.
tencer nevertheless gives the death penalty because of inability or unwillingness to specify a reason for mitigation, the defendant has been given the wrong sentence. If, on the other hand, the Court continues to insist that there are relevant and irrelevant reasons for a life sentence, the requirement of a reason still will not improve sentencing. There is no way even for the juror to know whether the juror’s hesitance to impose death stems from a relevant or irrelevant consideration.

**CONCLUSION: FURMAN V. GEORGIA VERSUS McGAUTHA V. CALIFORNIA**

The attack on reasons for imposing a capital sentence does more than disqualify mandatory sentencing and more than require permissive sentencing statutes which leave ultimate discretion to spare a defendant in the sentencer. Permissive death penalty statutes themselves are justified, as in Gregg, by reference to aggravating circumstances that are said to represent the reasons death is imposed. But if juries and judges can never really know the reasons for their death penalty judgments, then aggravating circumstances no more explain a sentencer’s decision than do mitigating ones. Gregg is premised on the proposition that at least the selection for death can be based on reason even if mitigation cannot. But there is little hope for a “meaningful basis” of decision from a statutory list of aggravating circumstances.

The Court continues to be preoccupied by the radically different paths represented by *Furman v. Georgia* and *McGautha v. California*. *Furman* promised that persons would not be executed without rational justification. *McGautha* permitted "untram-

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270. *Cf. supra* notes 137-39 and accompanying text.
273. 402 U.S. 183 (1971). Unlimited sentencer discretion in capital sentencing was challenged on due process grounds. *McGautha*, 402 U.S. at 196. A companion challenge argued that bifurcated proceedings were required in capital cases. *Id.* at 208-20. Justice Harlan rejected this claim as well. Justice Harlan, speaking for the Court, concluded that drawing up a list of aggravating circumstances is a task “which [is] beyond present human ability.” *Id.* at 204. Justice Harlan had confidence that a sentencing jury would “act with due regard for the consequences.” *Id.* at 208. For an account of the relationship between *McGautha* and *Furman*, see *Lanza-Danduse*, Formality, Neutrality, and Goal-Rationality: The Legacy of Weber in Analyzing Legal Thought, 73 J. Cr. & L. & Criminology 533, 545 n.35 (1982).
meled discretion” in the decision to impose death.\textsuperscript{275} Gregg’s approval of aggravating circumstances along with open mitigation represents an attempt to have both reason and discretion. Mandatory sentencing that follows \textit{Lockett} represents another such attempt. One may doubt whether both goals can be obtained in one death penalty statute.

The Court has not considered the more serious problem that \textit{Furman}’s requirement of reason perhaps cannot be satisfied at all. We just do not know why juries and judges impose the death penalty. Guided discretion presents merely the illusion of a rational process. The only choice in death penalty law may be the “awesome responsibility”\textsuperscript{276} of absolute discretion or an end to capital punishment.*

\textsuperscript{275} \textit{McGautha}, 402 U.S. at 205.

\textsuperscript{276} \textit{Id.} at 208.

* As this article was going to print, the Georgia Supreme Court answered the question certified in Zant v. Stephens, 102 S. Ct. 1856 (1982), concerning the practice of the Georgia Supreme Court in affirming judgments of death in cases in which multiple statutory aggravating circumstances are found by the finder of fact, one or more of which findings are reversed on appeal. The Georgia Supreme Court stated that statutory aggravating circumstances serve the role only of determining those murder cases in which death is a potential penalty. As long as at least one statutory aggravating circumstance is found validly, the case remains a potentially capital one. The actual decision to impose the penalty of death is made in the discretion of the factfinder, without further reference to statutory aggravating factors as such. Zant v. Stephens, No. 38,763 (Ga. Oct. 27, 1982).

The Georgia Supreme Court’s candor reveals that the hope that specified aggravating circumstances would channel sentencer discretion in the death penalty decision was misguided. Once one aggravating circumstance is found, the sentencer in Georgia has essentially unlimited discretion with regard both to mitigating and aggravating factors. Such a system echoes Justice Harlan’s position in \textit{McGuatha v. California}, 402 U.S. 183 (1971), favoring sentencer discretion once guilt was determined in a capital crime.